86-921

No. _____

In The
Supreme Court of the United States
October Term, 1986

HUGHES A. BAGLEY,

Petitioner,

vs.

IOWA BEEF PROCESSORS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. In a libel action instituted by a private person, does the republication to the news media, including the Associated Press and United Press International, of a defamatory statement originally submitted to members of a United States Congressional Subcommittee defeat or destroy any privilege to which the publisher might otherwise be entitled under the First Amendment Right to Petition Clause of the Constitution?

2. Is a libelous communication addressed to a Congressional subcommittee and to "the media . . . and the public" and then widely distributed and republished in a wholesale manner a legitimate petitioning activity, or is it nothing more than a "sham" under the guise of petitioning the government?

3. In a libel action where the trial court and jury determined, under proper instructions, that the libelous publication was published by defendant with actual malice (knowledge of its falsity or reckless disregard of whether it was false or not), should the trial court's judgment be affirmed?

PARTIES

The parties to this action are those as set forth in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit to review its judgment entered July 24, 1986 which reversed a judgment for libel on a jury verdict in favor of petitioner and against respondent awarding petitioner One Million Dollars in compensatory damages and Five Million Dollars in punitive damages.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reprinted as Appendix A, pages App. 1 to App. 39, and the Order of the District Court for the Northern District of Iowa dated June 24, 1983, is reprinted as Appendix B, pages App. 40 to App. 63. The opinion of the Court of Appeals has not been published as of this date.

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JURISDICTION

The Opinion of the Court of Appeals was filed July 24, 1986. A Petition for Rehearing was filed by Respondent which was denied by the Court of Appeals on September 11, 1986. The Mandate in this case has been stayed until December 10, 1986, pending the filing of a Petition for a Writ of Certiorari by that date. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254.

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CONSTITUTIONAL PROVISIONS

The United States Constitution, Amendment I, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.

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STATEMENT OF THE CASE

This controversy originated in June, 1977, when Iowa Beef Processors, Inc. ("IBP") filed suit against Hughes A. Bagley ("Bagley") under the Federal Diversity Statute, 28 U.S.C. § 1332. IBP, in its Complaint, sought damages and injunctive relief against Bagley. On October 4, 1979, Bagley filed suit against respondent IBP for libel and other tortious claims. The suit was filed in the United States District Court for the Northern District of Iowa, Western Division, and was tried to a jury. A jury verdict was returned on December 30, 1982, awarding a judgment for libel in favor of Bagley against IBP for compensatory and punitive damages. The jury also awarded Bagley compensatory and punitive damages on all other claims submitted by the trial court. This Petition for Certiorari involves only Bagley's libel judgment against IBP.

The basis of the libel claim was a thirty-one page letter (Appendix C) initiated and published by IBP under date of August 1, 1979. Bagley claimed that such publication libeled him by depicting him to the public in general, and the meat industry in particular, as a liar, a thief, and a man and employee of questionable ethics, integrity and reliability. The defamatory communication was addressed not only to the Congressional subcommittee, but also to "the *media*, the beef and cattle industry and the *public*" (Emphasis supplied). Appendix C, page App. 71.

Subsequent to sending the letter to members of the Congressional Small Business Committee, IBP distributed the letter to numerous entities and persons within the meat industry as well as the news media, including Associated Press, United Press International, Wall Street Journal,

Gannett News Service, and other major media outlets. Appendix D—IBP Trial Exhibit 94. IBP testified that Exhibit 94 was the list of persons to whom its defamatory letter (Appendix C) was mailed or distributed.

In submitting the case to the jury, the judge instructed on Iowa common law with regard to recovery of compensatory damages, ruling that IBP had not proved, as a matter of law, any privilege for the defamatory publication. The trial judge instructed the jury that in order for Bagley to recover punitive damages, Bagley had the burden to prove by clear and convincing evidence that the letter was published by IBP with actual malice. The court, in its instructions, defined actual malice as knowledge of falsity or reckless disregard of whether it was false or not. The trial court also ruled Bagley was a private person. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

IBP, after trial, filed a Motion for Judgment Notwithstanding the Verdict or, in the alternative, for New Trial. The District Court wrote a detailed Memorandum Order overruling those post-trial motions. Appendix B. The trial court ruled, in its post-trial Order, that IBP's effort at petitioning the government was a "sham", was of questionable good faith, and was not legitimate petitioning activity since it was not done in "an appropriate manner", citing IBP's intent to damage Bagley and its wholesale dissemination of the libelous publication. Appendix B, page App. 50.

The Court of Appeals reversed and remanded the libel judgment, ruling that IBP's petitioning effort was genuine and its redistribution was legitimate as an effort to enlist support for its position.

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ARGUMENT

I.

THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A QUESTION PERTAINING TO THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION WHICH HAS NOT BEEN ADDRESSED OR DECIDED BY THE SUPREME COURT.

A. THE COURT OF APPEALS HELD THAT REPUBLICATION OF A DEFAMATORY COMMUNICATION DID NOT DESTROY OR DEFEAT A PRIVILEGE ARISING FROM A FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT, ALTHOUGH THE DOCUMENT WAS DISTRIBUTED TO THE NEWS MEDIA AS WELL AS TO A CONGRESSIONAL SUBCOMMITTEE.

The Supreme Court, commencing with *New York Times v. Sullivan, supra,* has been attempting to balance the First Amendment rights with the rights of states to protect an individual's most priceless asset, his reputation. In *McDonald v. Smith,* — U.S. —, 105 S.Ct. 2787 (1985), the Supreme Court held that a defendant in a libel action is entitled to a qualified privilege if the defamatory publication is involved in the right to petition the government under the First Amendment of the Constitution. However, the Supreme Court has not defined what limits, if any, there are for republication or redistribution of the "petitioning" communication in a libel action. In *McDonald,* the communication involved a letter addressed to the President of the United States as well as some of his advisors concerning the qualifications of a nominee for United States Attorney. The letter was not redistributed or republished in any form to any other source. In the

present controversy, IBP submitted its defamatory communication to the members of the Congressional subcommittee, and subsequently republished and redistributed the communication to members of the news media, including the Associated Press, United Press International, Wall Street Journal, Gannett News Service, and various other newspapers and television stations around the country.

The Court of Appeals, in its decision, held that IBP's actions were intended to influence the legislative process and constituted protected First Amendment petitioning citing *Eastern Railroad President's Conference v. Noerr Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); and *California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508 (1972). The Court of Appeals also held that IBP's later redistribution of the letter was protected petitioning activity as an effort to enlist the support and influence of those to whom the communication was distributed, citing *Noerr Motor Freight, Inc., supra.*

The trial court ruled as a matter of law that the actions of IBP in its petitioning efforts under the "Noerr-Pennington Doctrine" fell within the sham exception noted in *California Motor Transport Company v. Trucking Unlimited, supra.* The trial court held that "defendant's actions were not motivated by a genuine desire to influence legislation, but rather by a desire to cause plaintiff harm." Appendix B, page App. 50. The trial court also ruled that in order to avail itself of the petitioning privilege, the dissemination of the defamatory statement must be done in an "appropriate manner" and ruled that it was not protected petitioning when the defendant published the com-

munication "in part through the media generally for the public and in particular for those in the meat industry". Appendix B, page App. 52.

Our courts, federal and state, have consistently held that in order for a defamation defendant to avail itself of a privilege, a defamatory statement must be limited as to the time, place and manner of its distribution or publication. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692 (8th Cir. 1979); *Mills v. Denney*, 63 N.W.2d 222 (Iowa 1954); *The Savage is Loose Company v. United Artists*, 413 F.Supp. 555 (S.D.N.Y. 1976); *Robinson v. Home Fire & Marine Insurance Company*, 59 N.W.2d 776 (Iowa 1953).

The Eighth Circuit Court of Appeals in *Asay, supra*, ruled that

> publication to the news media is not ordinarily sufficiently related to a judicial proceeding to constitute a privileged occasion . . . . Otherwise to cause great harm and mischief, a person need only file false and defamatory statements as judicial proceedings and then proceed to republish the defamation at will under the cloak of immunity . . . *Asay, supra* at 697-98.

While *Asay* relates to a testimonial or judicial privilege, the analogy cannot go unnoticed. To paraphrase *Asay* in the petitioning aspect, "otherwise, to cause great harm and mischief, a person need only file false and defamatory statements [in a petition to his Congressman] and then proceed to republish the defamation at will under the cloak of immunity . . ."

As the Iowa Supreme Court stated in *Robinson v. Home Fire & Marine Insurance Company, supra* at p. 782:

> . . . A qualified privilege may be abused by *excessive publication* of the defamatory matter, as by knowingly publishing it to a person to whom its publication is not otherwise privileged. (Emphasis supplied)

The United States Supreme Court has ruled that republication of a libelous communication outside the arena of the privileged forum destroys or defeats the privilege under the Speech and Debate Clause of the United States Constitution. *Hutchinson v. Proxmire,* 443 U.S. 111 (1979).

The Supreme Court, in *Hutchinson,* quoting Mr. Justice Story in *2 J. Story, Commentaries on the Constitution,* §864, pp 439-440 (1883) states:

> No man ought to have a right to defame others under colour of a performance of the duties of his office. And if he does so in the actual discharge of his duties in Congress, that furnishes no reason, why he should be enabled through the medium of the press to destroy the reputation, and invade the repose of other citizens. *Hutchinson v. Proxmire, supra* 443 U.S. at 128.

By republishing its defamatory communication to the public in such wholesale fashion, IBP went beyond the privileged forum, abused the legislative process, and was not entitled to the protective cloak of the First Amendment.

The trial court was correct in denying IBP any privilege for the republication of the defamatory letter to members of the media, beef and cattle industry and public. Such republications go well beyond the confines of any protection afforded by the right to petition the government under the First Amendment of the Constitution.

B. SUBSTANTIAL COMPETENT EVIDENCE WAS INTRODUCED TO SUPPORT THE TRIAL COURT'S RULING AS A MATTER OF LAW THAT, BY WHOLESALE PUBLICATION OF A DEFAMATORY LETTER TO THE MEDIA AND THE PUBLIC, IBP'S PETITIONING OF THE GOVERNMENT UNDER THE FIRST AMENDMENT TO THE CONSTITUTION WAS NOT A GENUINE, LEGITIMATE PETITIONING ACTIVITY, AND CONSTITUTED A SHAM EXCEPTION TO THE "NOERR-PENNINGTON" DOCTRINE.

IBP in its defamatory letter, acknowledged that it was addressing not only the Congressional subcommittee but was also submitting its publication for the benefit of the media, the beef and cattle industry, and the public. The First Amendment does not include an absolute license to destroy lives or careers as stated by Justice Harlan in *Curtis Publishing Company v. Butts*, 388 U.S. 130 at 170 (1967). While *Curtis Publishing Company, supra* is a First Amendment Freedom of the Press issue, it is appropriate here by analogy.

The trial court held as a matter of law that, because of IBP's efforts to address and publish its defamatory letter to the media and public, outside of the legislative arena, IBP's petitioning efforts were not genuine, were illegitimate, and were not entitled to any privilege, qualified or absolute. The Court of Appeals held that the record was devoid of any evidence to suggest that IBP's actions abused or corrupted the legislative process surrounding the subcommittee's investigation. Appendix A, pages App. 15-16.

It is submitted by Bagley that there was substantial competent evidence to support the trial court's finding.

IBP's intent is the focal point to determine whether there was a genuine petitioning effort or whether IBP was guilty of attempting to "manufacture a privilege". Intent must always be proved by circumstantial evidence, and Bagley contends that there was such proof by the facts introduced and inferences to be drawn therefrom.

All the evidence supporting the jury's finding of actual malice should have satisfied the Court of Appeals as it did the trial court. Also, a reading of the record will show that an IBP officer was quoted as saying that IBP was going to get Bagley and put him in jail. An officer of IBP told Bagley that IBP was going to break him, and the President of IBP told Bagley's employer that IBP did not want to do business with a company which hired Bagley. This evidence supports the trial court's finding that "[IBP's] actions were . . . motivated . . . by a desire to cause plaintiff harm". Appendix B, page App. 50. Further, IBP's excessive and abusive dissemination of the defamation, outside of the "petitioning arena", is circumstantial evidence which supports the inference drawn by the trial court that IBP's petition was a sham and neither legitimate nor genuine.

The trial court was in a position, after twelve days of trial, to assess and evaluate IBP's intent, and the evidence strongly supports the court's ruling that IBP went far beyond the confines of the First Amendment. The Constitution was framed as a shield, not a sword. IBP has abused, perverted and corrupted the legislative process and the Constitution, and it should be entitled to no protection for its wholesale dissemination of a defamatory letter which destroyed a private life.

This appeal has substantial public importance and involves a question of libel law which has not previously

been and should now be addressed by the Supreme Court. The Supreme Court should decide whether a Constitutional privilege extends to wholesale republications of a petition to the government under the First Amendment.

II.

A SEPARATE AWARD OF PUNITIVE DAMAGES REQUIRING PROOF OF ACTUAL MALICE BY CLEAR AND CONVINCING EVIDENCE RENDERS AN ERRONEOUS COMPENSATORY DAMAGE INSTRUCTION HARMLESS AND REQUIRES THAT A LIBEL JUDGMENT BE AFFIRMED.

The trial court in this case instructed the jury that Bagley could recover punitive damages only if he demonstrated by clear and convincing evidence that IBP's actions in publishing the defamation were motivated by actual malice. In its instructions, the trial court defined actual malice as "a publication . . . made with . . . knowledge that it is false, or with reckless disregard of whether it was false or not." Appendix A. page App. 31.

The Court of Appeals. in its Opinion, held that the instructions submitted by the trial court pertaining to the proof required of Bagley to recover compensatory damages were erroneous. Such error, if in fact it was error, is harmless in light of the finding by the jury that Bagley had proven by clear and convincing evidence that IBP published the defamation with actual malice.

The United States Supreme Court has previously held that a separate award of punitive damages supported by proper instructions and proper proof renders an erroneous compensatory damage instruction harmless. *Curtis Publishing Company v. Butts*, 388 U.S. 130, 166 (1967) (Warren, C.J., concurring). See also *Marcone v. Pent-*

house International Magazine for Men, 754 F.2d 1072 (3rd Cir.), cert. denied, 106 S.Ct. 182 (1985).

The Court of Appeals acknowledged the Supreme Court's ruling in *Curtis Publishing Company, supra* Appendix A, page App. 31. The Court of Appeals, however, refused to affirm in accordance with *Curtis Publishing Company* because, as the Court of Appeals stated in its opinion.

> This court is unable reasonably to determine whether the jury's award of punitive damages flowed form a preliminary conclusion that Bagley proved the falsity of the challenged statements or that IBP had simply failed to prove their truth. Appendix A, page App. 32.

It is impossible to determine how Bagley could prove by clear and convincing evidence that IBP published its defamatory communication with knowledge of its falsity or with reckless disregard of whether it was false or not, without the inherent finding by the jury that Bagley had proven the falsity of the publication in the first instance. A jury could not be convinced that IBP knew its defamation was false without first deciding that Bagley had proven the falsity thereof.

A de novo review of the record, if certiorari is granted, will show that there was substantial evidence of actual malice. In fact Judge Fagg stated in his dissent in *Bagley v. Iowa Beef Processors, Inc.*, 755 F.2d 1300 at 1320:

> . . . after an independent review of the evidence, *New York Times Company v. Sullivan*, 376 U.S. 254, 285; 84 S.Ct. 710, 728; 11 L.Ed.2d 686 (1964), I conclude that Bagley presented clear and convincing evidence of actual malice, *Bose Corp. v. Consumers Union*

of the United States, — U.S. —, 104 S.Ct. 1949, 1967, 80 L.Ed.2d 502 (1984)

Notwithstanding these separate and distinct, even *de novo,* findings of actual malice and the explicit precedent of *Curtis Publishing Company, supra,* the Court of Appeals refused to affirm this libel judgment. This creates a conflict in precedents and this conflict should be resolved by the Supreme Court.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the Court of Appeals for the Eighth Circuit to review the questions presented herein.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1894

In Re:

IBP Confidential Business Documents Litigation
Hughes A. Bagley,

Appellee,

v.

Iowa Beef Processors, Inc.,

Appellant.

Appeal from the United States District Court for the Northern District of Iowa.

Submitted: April 30, 1985

Filed: July 24, 1986

Before LAY, Chief Judge, and HEANEY, BRIGHT,* ROSS, McMILLIAN, ARNOLD, John R. GIBSON, FAGG, and BOWMAN, Circuit Judges, En Banc.

FAGG, Circuit Judge.

Iowa Beef Processors, Inc. (IBP) appeals from the judgment of the district court awarding Hughes A. Bagley, a former IBP employee, $7 million in compensatory and punitive damages as well as $2.33 million in prejudgment interest. That judgment was entered on three distinct claims: (1) libel; (2) tortious interference with present employment; and (3) tortious interference with future employment opportunities.

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*The HONORABLE MYRON H. BRIGHT assumed senior judge status on June 1, 1985.

IBP's challenge to the district court's judgment has previously been considered by a panel of this court. *Bagley v. Iowa Beef Processors, Inc.*, 755 F.2d 1300 (8th Cir. 1985). Given the important issues raised by this case, however, IBP's appeal has now been considered by the court en banc. After carefully considering each of the issues raised by IBP, we affirm in part, reverse in part, and remand Bagley's libel claim to the district court for a new trial.

I. Background

Late in 1977, the Subcommittee on General Small Business Problems of the House of Representatives Committee for Small Business (the Subcommittee) initiated an investigation into various aspects of the meat industry. The Subcommittee's goal in undertaking the investigation was essentially two-fold. First, the Subcommittee hoped to identify business practices employed in the meat industry that affect adversely the competitive position of small meatpackers. Second, and more important, the Subcommittee hoped to determine whether existing laws were sufficient to ensure the continued presence of healthy competition in the meat industry.

During its investigation, the Subcommittee closely examined the activities of various meatpackers. Over the course of its investigation, however, the Subcommittee's interest came to focus most sharply on the activities of one particular meatpacker. That meatpacker was IBP.

The Subcommittee's interest in IBP was hardly surprising. Over the course of a relatively few years, IBP had grown into the largest processor of beef in the United States, and by the very nature of its size, IBP was viewed by many to be in a position to influence significantly the

overall structure and development of the meat industry. Further, and equally as significant to the Subcommittee were various IBP business activities that in the past had attracted substantial public attention. These activities, while often innovative, had at times also been highly controversial. In fact, IBP on a number of occasions had found itself the target of antitrust litigation, adverse publicity, and violent union confrontation.

In the course of its activities, the Subcommittee conducted a number of public hearings. During these hearings, a variety of witnesses appeared and testified concerning IBP and its impact on the meat industry. Several of these witnesses specifically accused IBP of engaging in anticompetitive practices.

As part of its overall investigation, the Subcommittee, in November of 1978, subpoenaed a large number of documents then under protective order in the United States District Court for the Southern District of Iowa. At that time, the ownership of these documents was at the center of a lawsuit filed by IBP against Hughes A. Bagley, a former IBP executive vice president. *See IBP, Inc. v. Bagley*, 754 F.2d 787 (8th Cir. 1985).

Bagley, an individual with thirty years experience in the meat industry, had been an executive with IBP from December of 1971 until July of 1975. In July of 1975, Bagley was abruptly fired by IBP and was ordered to leave immediately. Bagley left immediately, but in so doing took with him from his personal files the documents that three years later became the focus of IBP's lawsuit against him. These documents, numbering many thousands of pages, included IBP weekly profit and loss statements, IBP monthly production and sales reports, confidential legal memoranda,

and memoranda outlining IBP's goals, marketing strategies, and pricing formulas.

The events leading to IBP's lawsuit against Bagley took place in late 1977 and early 1978. During that period, Bagley met privately with and in several cases provided IBP documents to a number of individuals, including several attorneys who at that time were involved in (or hoped to become involved in) extensive antitrust litigation against IBP and several other meatpackers. Shortly after these meetings and during the course of the antitrust litigation, IBP learned of Bagley's activities and of his possession of internal IBP documents. *See Meat Price Investigators Association v. Iowa Beef Processors, Inc.*, 448 F. Supp. 1, 2-4 (S.D. Iowa 1977), *aff'd*, 572 F.2d 163, 164-65 (8th Cir. 1978).

At that point, IBP instituted its action against Bagley. In that action, IBP sought to recover possession of the documents. IBP also accused Bagley of violating a termination agreement that had been entered into by Bagley with IBP following Bagley's departure from IBP.

As part of IBP's lawsuit, the district court placed a protective order on the IBP documents in Bagley's possession. That order was in place when the Subcommittee's subpoena duces tecum was issued to Bagley. On Bagley's motion, the district court partially lifted the protective order to enable Bagley to comply with the Subcommittee subpoena. *See Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), *cert. denied*, 441 U.S. 907 (1979).

After examining the subpoenaed documents, the Subcommittee, in January of 1979, subpoenaed Bagley personally. Under subpoena, Bagley met with Subcommittee investigators in January and answered questions concern-

ing the subpoenaed documents. Bagley was also subpoenaed to testify before the Subcommittee, and in July of 1979, Bagley again met with Subcommittee investigators to answer additional questions concerning the IBP documents.

Prior to the hearings at which Bagley was scheduled to testify, Subcommittee Chairman Neal Smith of Iowa sent a letter on behalf of the Subcommittee to IBP President Robert Peterson. In that letter, Congressman Smith invited IBP to send a representative to Washington to testify before the Subcommittee during its July hearings.

Congressmen Smith stated that any representative sent by IBP would appear "under oath" and would have an opportunity to present a "written statement" as well as make an "oral presentation of reasonable length." Following that presentation, IBP's representative would be "questioned" by the members of the Subcommittee. *See Small Business Problems in the Marketing of Meat and Other Commodities: Hearings Before the Subcommittee on SBA and SBIC Authority and Small Business Problems of the House Committee on Small Business*, 96th Cong., 1st Sess. 3 (1979).

In his letter, Congressman Smith also specifically identified those topics of central interest to the Subcommittee. The topics mentioned by Congressman Smith included

> matters raised by the so-called "Bagley documents," the reported expansion efforts of IBP into the western portion of the United States, matters involving the labor and transportation practices and relationships of IBP, activities of IBP in the areas of meat pricing and cattle futures, the procurement practices of IBP in obtaining live cattle for slaughter and other possible topics.

Id. In essence, these topics touched upon the various concerns regarding IBP's activities that had been raised during the course of the Subcommittee's investigation.

In closing the letter, Congressman Smith emphasized the seriousness of the Subcommittee's investigation, stating:

> As you know, a great deal of testimony received by the Subcommittee has been in regard to Iowa Beef Processors. If new legislation or rules are enacted to limit dominance by any companies in the meat industry or to ensure that enough competition remains in the industry to prevent undesirable economic consequences, it is clear that Iowa Beef Processors will be one of the companies most affected.

Id.

The Subcommittee reconvened on July 23, 1979. During two days of hearings, Bagley was the only witness to appear and testify. In his two days of testimony, Bagley (under questioning) addressed a number of topics related to various IBP business practices. These topics included IBP's company goals, IBP's pricing practices, and IBP's dealings with other meat packers.

One topic discussed by Bagley during his testimony is particularly relevant to the present dispute. That topic concerned an IBP quantity discount program offered on its Cattle-Pak boxed beef product. In general terms, boxed beef is a method of processing and marketing beef in which IBP, rather than the retailer, fully processes the beef carcass into primal and subprimal cuts. These cuts are then individually packed in vacuum-sealed plastic bags and shipped individually or in units (as is the case with Cattle-Pak) to retailers. Not only is this an efficient

method of processing beef, but because much of the bone and fat that would otherwise be shipped to retailers is removed by IBP during processing, shipping costs are substantially reduced.

Bagley testified that in its inception, the Cattle-Pak discount program, which, according to Bagley, was offered only to IBP's biggest customers, was intended to reflect and pass on a portion of the cost savings realized by IBP from high volume sales. Bagley stated, however, that the corporation failed to justify or document the supposed cost reductions prior to offering the program. Bagley testified further that IBP continued the discount program even after serious questions concerning its ability to justify the program based on cost reductions had been raised. According to Bagley, while questions about the program culminated in mid-1973 with a recommendation that the program be discontinued, some type of discount program was still in effect at IBP in June of 1975.

While invited to do so, IBP declined to send a representative to the Subcommittee's July 1979 hearings. Rather, on August 1, 1979, IBP, through its president, Robert Peterson, responded to Congressman Smith's invitation by letter (the Peterson letter). In that letter, IBP explained its reasons for not attending the hearing, essentially taking the position that Congressman Smith was prejudiced against it and would prevent IBP from receiving a fair hearing before the Subcommittee. *See* Letter from IBP to Congressman Smith 1-5 (August 1, 1979). IBP also offered a detailed response challenging the testimony of each of the witnesses who had appeared before the Subcommittee and testified about IBP and its business practices.

Approximately one-half of the Peterson letter addressed statements made by Bagley during his two days of testimony. IBP answered fully each of the issues covered by Bagley, characterized by IBP as a disgruntled ex-employee who, upon leaving IBP, "stole 7 boxes of IBP documents, many of a confidential business and legal nature." *Id.* at 15.

Of particular significance here is IBP's explanation of the quantity discount program testified extensively to by Bagley. In its response to Bagley's description of that program, IBP sharply attacked Bagley's testimony, asserting that "Bagley's version of IBP's quantity discount program is absolutely false, and * * * constitutes perjury * * *." *Id.* at 24.

Explaining its version of the program, IBP conceded that for a short period of time a quantity discount had been offered to all IBP customers purchasing a certain quantity of Cattle-Pak cattle. IBP asserted, however, that on advice of counsel the discount program was discontinued in late 1973 pending a long-range study intended to identify and quantify those savings believed by IBP to be inherent in volume purchases. According to IBP, Bagley was intimately involved in the termination of the discount program and knew the program had been discontinued in 1973. *See id.* at 24-27.

With respect to Bagley's contention that the quantity discount program was still in effect in 1975, IBP did acknowledge that for a short period in 1975 a price reduction of eight dollars per head had been offered to all IBP Cattle-Pak customers. IBP contended, however, that this rebate constituted a special one-time price reduction in no

way related to IBP's long discontinued quantity discount program. According to IBP, Bagley's suggestion to the contrary was "clear perjury." *Id.* at 27.

IBP sent a copy of the Peterson letter to each member of the Subcommittee and expressly requested that the Subcommittee make the letter a part of its formal public record. The Subcommittee refused IBP's request and did not make the Peterson letter a part of the Subcommittee's public record. However, by mid-September portions of the letter had been leaked to the press and had been widely reported in the media.

Despite the Subcommittee's refusal to make the Peterson letter a part of its formal record and despite repeated requests, IBP for a time refused to make copies of the Peterson letter available to interested parties. Rather, IBP referred all inquiries to the Subcommittee. In October, however, after the letter had already received extensive media coverage, IBP made the letter available to those in the media and in the meat industry who expressed an interest in it. Further, late in 1979, as part of a bound volume containing several other documents, IBP sent the Peterson letter to a number of interested parties, including members of the Livestock and Grain Subcommittee, IBP's directors, officers, and plant managers, certain members of various agricultural associations, professors at several academic institutions, and approximately fifty members of the media.

Not surprisingly, given the highly antagonistic relationship already existing between Bagley and IBP, Bagley, in the wake of the Peterson letter as well as other events occurring after his congressional testimony, filed

the present lawsuit against IBP. As originally filed, Bagley asserted five separate and distinct claims against IBP Due to attrition, however, only three of these claims are still a part of Bagley's lawsuit.

The first claim asserted by Bagley in the district court was a claim of libel arising out of statements made by IBP in the Peterson letter. As submitted to the jury, Bagley specifically challenged only two statements made by IBP in the Peterson letter: First, IBP's statement that "[Bagley] stole 7 boxes of IBP documents"; and second, IBP's statement that "Bagley's version of IBP's quantity discount program is absolutely false, and * * * constitutes perjury * * *." Trial Court Instruction No. 9.

The second claim asserted by Bagley was a claim of tortious interference with present employment. In that claim, Bagley contended that following his congressional testimony he was abruptly dismissed from Dubuque Packing (Dubuque), his then current employer. According to Bagley, that dismissal, coming only six days after his testimony, was effectively caused by veiled yet intimidating threats made by IBP to Dubuque.

The final claim asserted by Bagley was a claim of tortious interference with future employment opportunities. In that claim, Bagley argued that IBP caused not only his termination by Dubuque but also effectively "blacklisted" him from the entire meat industry. While prior to his testimony and firing Bagley received repeated offers of employment, after these events offers of employment completely stopped and Bagley was unable to locate work in the meat industry

Following a jury trial, Bagley prevailed on all three of these claims and was awarded a total of $9.33 million in damages and interest. IBP's appeal from these awards is now before the court.

II. Discussion

A. Libel

Before the district court, IBP asserted several defenses to Bagley's claim of libel. These defenses included claims of both common law and constitutional privilege. In essence, IBP asserted that the Peterson letter should be protected under either a common law testimonial or right to reply privilege or under a constitutional privilege based upon the first amendment right to petition. The district court rejected each of the privileges asserted by IBP.

The district court likewise rejected IBP's contention that Bagley should be held to be a public figure for purposes of this action and should be required to prove "actual malice" as defined by the Supreme Court in *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964). By contrast, the district court ruled that Bagley was a purely private figure for purposes of this lawsuit.

Finally, the district court ruled, again over objection, that in light of the harsh and unprivileged nature of IBP's statements, Bagley would not be required to prove the falsity of IBP's libelous statements. Rather, the district court held that IBP would be required to prove the truth of its statement that Bagley "stole" IBP documents as well as its statement that Bagley committed "perjury" before the Subcommittee.

On appeal from a jury verdict awarding Bagley $1,000,000 in compensatory damages and $5,000,000 in punitive damages, IBP challenges each of these rulings by the district court. IBP also challenges a number of the district court's evidentiary rulings that it asserts were highly prejudicial, denied IBP a fair trial, and induced the jury to award constitutionally excessive punitive damages. With IBP's various contentions in mind, we turn to Bagley's libel judgment.

1. Common Law Privilege

Before the district court, IBP repeatedly asserted that under common law the Peterson letter was a privileged communication and could not be used by Bagley as a basis for recovery. In support of its position, IBP asserted two separate and distinct claims of common law privilege: (1) an absolute common law privilege applicable to statements made during the course of legislative proceedings; and (2) a qualified common law privilege protecting a party's ability to reply in an appropriate manner to public accusations.

While neither party has addressed the issue, we note initially that the question of qualified or absolute common law privilege, while not without federal implications in light of the involvement of a federal congressional subcommittee, is a question of state rather than federal common law. *See Webster v. Sun Co.*, 790 F.2d 157, 160 (D.C. Cir. 1986); *Yip v. Pagano*, 606 F. Supp. 1566, 1569-70 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3d Cir.), *cert. denied*, 106 S. Ct. 2248 (1986); *Bio/Basics International Corp. v. Ortho Pharmaceutical Corp.*, 545 F. Supp. 1106, 1110-13 (S.D.N.Y. 1982). Thus, to determine whether a common law privi-

lege exists, we must look to Iowa substantive law, which IBP and Bagley both concede is generally applicable to this action.

As this court has previously indicated, in the area of libel, Iowa common law recognizes both absolute and qualified privileges. *See Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 697 n.4 (8th Cir. 1979); *Johnston v. Cartwright*, 355 F.2d 32, 35 (8th Cir. 1966). Specifically, a review of the relevant Iowa case law indicates that under certain circumstances Iowa courts will recognize an absolute testimonial privilege, *see, e.g., Mills v. Denny*, 63 N.W.2d 222, 225 (Iowa 1954), or a qualified right to reply privilege, *see, e.g., Haas v. Evening Democrat Co.*, 107 N.W.2d 444, 451-53 (Iowa 1961). However, whether and to what extent a privilege will be applicable in a given case depends on the unique circumstances of that case and will be determined as a matter of law by the trial court. *Mills*, 63 N.W.2d at 227; *see also Johnston*, 355 F.2d at 35.

Here, the district court, after examining the available case law and after considering the occasion and circumstances giving rise to IBP's various distributions of the Peterson letter, rejected both claims of common law privilege. In so doing, the district court first concluded that IBP's widespread distribution of the Peterson letter to many individuals and entities totally unrelated to the Subcommittee's investigation could not reasonably be viewed as legislative testimony, and thus the letter fell beyond the narrowly defined scope of the testimonial privilege. The court also concluded that, although a right to reply privilege is available in certain cases, IBP's various distributions of the Peterson letter, under the circumstances of

this case, went beyond an appropriate response to the Subcommittee's investigation and as a consequence were unprotected under Iowa law by a right to reply privilege.

In making these determinations, the district court was without benefit of any Iowa court decision clearly suggesting how the Iowa courts would themselves have resolved the particular questions of privilege presented in this case. In the absence of controlling state law, this court will ordinarily give significant deference to a district court's resolution of unclear questions of state law. *St. Paul Fire & Marine Insurance Co. v. Rock-Tenn Co.*, 787 F.2d 340, 341 (8th Cir. 1986); *Northern States Power Co. v. ITT Meyer Industries*, 777 F.2d 405, 413 (8th Cir. 1985).

Here, our own independent review of Iowa case law convinces us that the district court's rulings on the questions of privilege must be affirmed. While not unchallengeable, the district court's decisions are neither without support nor unreasonable. Thus, we decline to second-guess the district court's rejection of IBP's claims of absolute and qualified state common law privilege.

2. First Amendment Petitioning

IBP contends, however, that regardless of the availability of a common law privilege, its activities with respect to the Peterson letter are classic examples of petitioning activity entitled to some degree of first amendment protection. The district court rejected IBP's contention, in effect concluding that IBP's activities were entirely devoid of first amendment substance or value. In reaching that conclusion, we believe the district court clearly erred.

We note initially that the Supreme Court has recently reaffirmed the principle that petitioning, like "other guar-

antees of [the first amendment,] * * * is an assurance of a particular freedom of expression." *McDonald v. Smith,* 105 S. Ct. 2787, 2789 (1985). This reaffirmation clearly underscores the coequal status of the right to petition with other first amendment rights.

In reviewing IBP's claim that its actions were genuinely intended to influence the legislative process and thus constitute protected first amendment petitioning, this court is guided by *Eastern Railroad Presidents Conference v. Noerr Freight, Inc.,* 365 U.S. 127 (1961), *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965), and *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972). While these cases involved antitrust rather than defamation claims, the principles underlying the Supreme Court's analysis in each of these cases are equally applicable to the present action and provide this court with a framework upon which to consider Bagley's challenge to the legitimacy of IBP's asserted petitioning.

Thus, before activities claimed to constitute first amendment petitioning will be stripped of all first amendment protection, the party challenging such an assertion must prove as a matter of fact, *see Independent Taxicab Drivers Employees v. Greater Houston Transportation Co.,* 760 F.2d 607, 612 n.9 (5th Cir.), *cert. denied,* 106 S. Ct. 231 (1985), that the challenged activities were not genuinely intended to influence the legislative process. In so doing, the challenging party must establish in part that the petitioning party has abused or corrupted the legislative process. *See, e.g., California Motor Transport Co.,* 404 U.S. at 511-16; *Razorback Ready Mix Concrete Co. v. Weaver,* 761 F.2d 484, 486-88 (8th Cir. 1985). Here, the record is

devoid of any evidence to suggest IBP's actions in any way abused or corrupted the legislative process surrounding the Subcommittee's investigation.

For almost two years, the Subcommittee's investigation had centered on potentially anticompetitive business practices in the meat industry, of which IBP is a prominent and often controversial member. During that period, numerous charges had been directed against IBP, and by July of 1979, the central focus of the Subcommittee's investigation clearly was on IBP. In fact, Congressman Smith in his letter to IBP explicitly stated that any legislation adopted as a result of the Subcommittee's investigation would leave IBP as one of the companies "most affected." In this largely adversarial context, IBP answered the charges directed against it by writing to Congressman Smith and the other members of the Subcommittee.

We believe it is of no significance that IBP chose to respond to the Subcommittee's investigation by letter rather than appear before the Subcommittee. The right to petition is personal in nature, and IBP, rather than the Subcommittee or its chairman, has the right to determine how and in what manner that right will be exercised. If IBP's presence was absolutely necessary to the Subcommittee's investigation, the Subcommittee could have subpoenaed IBP as it had Bagley.

The Peterson letter itself provides evidence that IBP's actions constituted petitioning activity, genuinely intended to influence the legislative process. Significantly in its letter, IBP did not raise issues not then before the Subcommittee, but rather limited its response to those topics already raised by the Subcommittee. That response

was essentially two-fold. First, IBP responded directly to the various charges brought against it in an attempt to give its side of every issue. Second, IBP sought, when possible, to undermine the testimony of the various witnesses (including Bagley) by bringing to light their potential motives and biases. This overall response, precipitated not by IBP but rather by a significant congressional inquiry, was largely defensive in nature and supports IBP's claim that its actions constituted first amendment petitioning.

IBP's later redistribution of the IBP letter in no way undermines our conclusion. By its very nature, the right to petition the government goes beyond direct petitioning activity. Rather, the right to petition the government necessarily includes all manner and mode of communication directed not only to the government but also to those individuals and entities whose support and influence may contribute materially to the legislative campaign being waged. *See, e.g., Noerr Motors Freight, Inc.*, 365 U.S. at 142-43.

Here, IBP's redistribution simply sought to inform and enlist the support of those elements of society believed by IBP to be interested in, potentially affected by, or in a position to influence the Subcommittee's investigation. Without these attendant rights, IBP's first amendment right to petition would be rendered virtually meaningless in this case, particularly since the governmental body to which IBP's letter was directed chose not to make it a part of the body's formal public record.

By response, neither Bagley nor the district court identified any evidence to support a conclusion that IBP's

actions did not constitute a genuine attempt to protect its interest by influencing the legislative process. No evidence was presented to suggest that IBP's actions were intended to or in fact perverted or in any way corrupted the legislative process. *See California Motor Transport Co.*, 404 U.S. at 511-16; *see also Razorback Ready Mix Concrete Co.*, 761 F.2d at 486-88.

At bottom, regardless of IBP's ill will towards Bagley, *see Noerr Motor Freight, Inc.*, 365 U.S. at 132-45, IBP's activities on their face clearly evidenced genuine petitioning activity. The district court's conclusion to the contrary was based on an erroneous interpretation of the applicable law, was unsupported by the evidence, and must be reversed. Thus, we hold that IBP's activities constituted genuine first amendment petitioning.

However, having concluded the district court erred in failing to recognize the nature of IBP's actions, we are not yet required to reverse Bagley's libel judgment. Rather, we must next identify the degree of protection to be accorded IBP's activities under the first amendment. After identifying the appropriate degree of protection, reversal will be required only if the district court's instructions failed to provide IBP with the appropriate level of first amendment protection.

3. Degree of First Amendment Petitioning

Before the district court and on appeal, IBP asserted that because first amendment petitioning was involved, its activities were entitled to an absolute constitutional privilege insulating it from all defamation liability. The Supreme Court, in *McDonald v. Smith*, 105 S. Ct. 2787

(1985), has now rejected that position. *Id.* at 2791. Rather, in *McDonald,* the Court emphisized that "there is no sound basis for granting greater constitutional protection to [petitioning] * * * than [to] other First Amendment expressions." *Id.* at 2791 (citation omitted); *see also id.* at 2794 (Brennan, J., concurring).

Flowing from the Supreme Court's discussion in *McDonald,* we hold that in the area of defamation, first amendment petitioning is protected by the same constitutional principles identified by the Supreme Court as applicable in other cases involving defamatory first amendment speech. More specifically, we conclude the principles embodied in such cases as *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), are fully applicable to the present controversy.

The fact that cases such as *New York Times* and *Gertz* involved media defendants, while arguably relevant in identifying the particular first amendment freedom involved, is in our view irrelevant to the question of what level of constitutional protection that right is to receive. To recognize the existence of a first amendment right and yet distinguish the level of protection accorded that right based on the type of entity involved would be incompatible with the fundamental first amendment principle that "[t]he inherent worth of * * * speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 105 S. Ct. 2939, 2953 and n.4 (1985) (White, J., concurring in result).

Since its decision in *New York Times,* the Supreme Court has sought an appropriate balance between two important yet often conflicting interests: (1) the interest in assuring vigorous and robust debate on public issues; and (2) the interest in protecting the reputation of each individual from unjustified defamatory attacks. As the principles intended to protect these interests have been shaped and defined, the Supreme Court has made clear that to identify the appropriate level of protection applicable in a particular case, a court must focus its inquiry on the question of whether the person defamed is a public official, a public figure, or a private figure.

In *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967), the Supreme Court held that public officials and public figures may not recover in defamation unless they "prove[] that the [challenged] statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times,* 376 U.S. at 279-80; *see Curtis Publishing Co.,* 388 U.S. at 162 (Warren, C.J., concurring); *see also Gertz,* 418 U.S. at 335-36 and n.7. The actual malice standard must be established by clear and convincing evidence, *id.* at 342, and is subject to independent rather than deferential appellate review, *Bose Corp. v. Consumers Union of the United States, Inc.,* 466 U.S. 485, 513-14 (1984).

While *New York Times* and *Curtis Publishing Co.* defined the constitutional limits applicable to the public official's or the public figure's right to recover for defamatory speech, it was not until *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974), that the Supreme Court delineated

the constitutional limitations applicable when the defamation action is brought by a purely private figure. In examining the question, the Supreme Court identified two central factors that distinguish private individuals from public officials or public figures.

First, the Supreme Court noted that public officials and public figures "usually enjoy significantly greater access to the channels of effective communication" than private individuals. *Id.* at 344. Thus, public officials and public figures are in a better position than private individuals to attempt to rebut and reduce the harm of a defamatory statement. *Id.; but see id.* at n.9. Because private individuals have fewer avenues of this type of self-help open to them, their overall potential for injury as a result of defamatory speech is significantly increased and as a result so is the state's interest in protecting that individual from injury. *Id.* at 344.

Second, and more important, the Supreme Court emphasized that public officials and public figures, unlike private individuals, have purposefully sought to become involved in the affairs of society either by "seek[ing] [a] governmental office" or by otherwise assuming a role of particular "prominence in the affairs of society." *Id.* at 344-45. Thus, to that extent these individuals invite and indeed must expect public comment, praise, and criticism alike concerning their fitness to command the public's attention and support. By contrast, a private individual has sought neither office nor influence and as a result has assumed no prominent role in society's affairs and has given up no interest in the protection of his or her reputation. In tandem, these two factors suggest private individuals

"are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." *Id.* at 345.

In light of these considerations, the Supreme Court in *Gertz* concluded that states should be given significant leeway in providing a legal remedy to the defamed private individual. With this in mind, the Court left states largely free to develop standards of recovery applicable to private figures, limited only by the requirement that the states not impose liability without fault. *Id.* at 347. The Supreme Court did provide, however, that although a simple showing of fault would allow a private individual to establish liability and recover actual damages, actual malice, as defined in *New York Times,* must still be established before presumed or punitive damages can be recovered. *Id.* at 348-50.

Since *Gertz,* the Supreme Court has in one instance apparently narrowed and in another instance further defined the applicability and requirements of *Gertz.* First, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 105 S. Ct. 2939 (1985), the Court determined that the *Gertz* limitation on the recovery of presumed and punitive damages should be applicable only when the defamatory statement involves a matter of "public concern." *Id.* at 2944-48. Matters of public concern go to the very core of the first amendment and encompass speech that is intended to effect political or social change or that is otherwise related to enlightened self-government. *Id.* at 2445-46. Absent speech of this nature, the balance of comparative interests shifts in favor of the state and allows a private individual to recover presumed and punitive damages without a showing of *New York Times* actual malice. *Id.* at 2946.

The second decision impacting the Supreme Court's decision in *Gertz* is *Philadelphia Newspapers, Inc. v. Hepps,* 106 S. Ct. 1558 (1986). In *Hepps,* as an initial point, the Court made clear that as a part of their defamation suit public officials and public figures must prove the falsity of the statements challenged. *Id.* at 1563; *see also id.* at 1570 n.10 (Stevens, J., dissenting). More important for our purposes, the Supreme Court then went on to hold that in order to recover in defamation private individuals must not only demonstrate fault but must also prove that the defamatory statements were in fact false. *Id.* at 1563-64.

4. Bagley's Status

With the applicable constitutional standards now identified, this court must next determine Bagley's status for purposes of this lawsuit. If Bagley is a public official or a public figure, the *New York Times* actual malice standard will be applicable to Bagley's libel claim. If, on the other hand, Bagley is found to be a private figure, the less formidable *Gertz* standard, as modified in *Dun & Bradstreet* and *Hepps,* will be applicable to that claim. The question of Bagley's status presents an issue of law to be determined by the court. *Dameron v. Washington Magazine, Inc.,* 779 F.2d 736, 740 (D.C. Cir. 1985), *cert. denied,* 106 S. Ct. 2247 (1986); *Marcone v. Penthouse International Magazine for Men,* 754 F.2d 1072, 1081 n.4 (3d Cir.), *cert. denied,* 106 S. Ct. 182 (1985); *cf. Rosenblatt v. Baer,* 383 U.S. 75, 88 (1966).

As an initial matter, the parties are in agreement on two points. First, the parties agree that Bagley is not a public official. Second, the parties also agree that Bag-

ley has not received such "pervasive fame or notoriety" that he can be viewed as "a public figure for all purposes and in all contexts." *Gertz*, 418 U.S. at 351. Further, we note that IBP does not contend that Bagley is one of those "exceedingly rare" individuals who with respect to the issues presented by this case can be considered an "involuntary" public figure. *Id.* at 345. Thus, our inquiry is narrowly limited to determining whether Bagley must be considered a limited public figure with respect to the narrow range of issues presented by his libel claim.

To resolve that question, our inquiry must begin with *Gertz*. Under *Gertz*, this court, in determining whether an individual should be considered a limited public figure, must focus its attention on the "nature and extent of an individual's participation in the particular [public] controversy giving rise to the defamation." *Id.* at 352. By so doing, the court will be able to determine whether the individual has voluntarily and purposefully injected himself into that controversy in an attempt to influence the resolution of the issues there involved. *Id.* at 345, 351.

Applying the factors identified in *Gertz*, this court must first identify the "particular [public] controversy giving rise" to IBP's defamatory speech. *See id.; McDowell v. Paiewonsky*, 769 F.2d 942, 948 (3d Cir. 1985); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); *see also Wolston v. Readers Digest Association*, 443 U.S. 157, 166 n.8 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979).

Although the Supreme Court has never explicitly identified those factors necessary to create a *Gertz* public

controversy, the Court has made clear that simple newsworthiness alone will be insufficient to generate such a controversy. *Wolston,* 443 U.S. at 167. Further, purely private disputes (such as a lawsuit) whose impact is limited primarily to the parties involved, while often of interest to the public, will also be insufficient to create a *Gertz* public controversy. *Time, Inc. v. Firestone,* 424 U.S. 448, 454 (1976). Rather, the Court, in identifying a *Gertz* public controversy, has focused its attention on those controversies involving questions of "public concern," *see Dunn & Bradstreet,* 105 S. Ct. at 2944-47, or, in other words, those controversies raising issues that might reasonably be expected to have an impact beyond the parties directly enmeshed in the particular controversy, *Waldbaum,* 627 F.2d at 1296-97.

Here, the particular controversy "giving rise" to IBP's defamatory letter was the Subcommittee's increasingly antagonistic inquiry into numerous IBP business practices. That investigation, which included a number of public hearings, generated substantial public comment and was widely reported in the media. Bagley's testimony alone generated well over a dozen news articles.

Further, the controversy generated by the Subcommittee's investigation, by its very nature, went beyond a purely private dispute that only by mere chance attracted the interest of the public. Rather, because the investigation had the potential to generate new legislation that might reasonably have been expected to affect both the meat industry and the consumer, the resulting controversy was in fact a "public" controversy, involving issues of significant public concern.

The Peterson letter itself was written in response to the Subcommittee's investigation and further demonstrates the well defined public nature of the particular controversy here at issue. In that letter, IBP specifically and in detail responded to each of the charges leveled against it throughout the Subcommittee's investigation. Further, IBP explicitly recognized the relatively widespread interest in the Subcommittee's proceedings when in its letter IBP appealed directly to the "open-minded members of * * * [the] Subcommittee, the media, the cattle and beef industry, and the public" for support. Letter from IBP to Congressman Smith 4-5 (August 1, 1979). The record is clear and the Peterson letter establishes that the Subcommittee's investigation into IBP was the particular public controversy that "gave rise" to the defamation here at issue. *See Gertz,* 418 U.S. at 352.

Having identified the particular controversy giving rise to the defamation the court must next examine the "nature and extent" of Bagley's involvement in that controversy. *Id.* As previously stated, this inquiry is necessary to determine whether Bagley has "thrust [himself] to the forefront of [that] . . . controversy in order to influence the resolution of the issues [there] involved." *Id.* at 345; *see Waldbaum,* 627 F.2d at 1297-98.

Here, Bagley's involvement in the Subcommittee's investigation was a limited one. Bagley appeared under subpoena, as a witness, and cooperated with the Subcommittee as he had an obligation to do. That participation was limited to answering whatever questions the Subcommittee had about IBP or the IBP documents. Further, both before and after his congressional testimony, Bagley

conscientiously avoided the media, making no public comment. In fact, outside the limited role of a subpoenaed witness, Bagley played no part in the policymaking or deliberative processes of the Subcommittee. And, the media attention that followed IBP's distribution of the Peterson letter provides no support for IBP's position because IBP cannot by its own conduct make Bagley a public figure. *Hutchinson*, 443 U.S. at 135.

In light of Bagley's limited involvement in the Subcommittee's investigation, this court cannot conclude that Bagley has purposely thrust himself into the legislative process in order to influence the resolution of the issues there involved. To do so would effectively deprive almost every witness appearing before a congressional subcommittee of his or her status as a private citizen. Such a result would be unnecessarily harsh and would largely ignore the valuable role private individuals play in the legislative process. Further, private individuals with relevant information would become hesitant to cooperate with a congressional inquiry and would thus deprive Congress of a valuable source of information.

IBP contends that the focus of this court's inquiry with respect to the nature and extent of Bagley's activities is far too narrow. In support of that position, IBP focuses its attention on the events leading to its lawsuit against Bagley in which IBP sought the return of the IBP documents. Specifically, IBP points to the number of instances in which Bagley met with and provided IBP documents to various individuals who for one reason or another were interested in IBP's business practices. IBP contends that these activities were freely and voluntarily

undertaken by Bagley and are sufficient to strip Bagley of his status as a private figure. We disagree.

Assuming Bagley's various activities are at all relevant to the question of whether he is a public or private figure, we still conclude they cannot deprive Bagley of the mantle of private person status. First, despite meeting with various individuals, Bagley never sought or received any public attention as a result of these meetings. Rather, his meetings with these individuals were entirely private and nonpublicized. In fact, it appears that Bagley was not even the individual who initiated these meetings. Further, it is not determinative that Bagley should have known his actions might lead to a lawsuit or might constitute a breach of his contractual agreement with IBP. *Cf. Wolston,* 443 U.S. at 167-68.

Second, regardless of his purpose in meeting with and providing documents to these individuals, the outcome of these activities was a purely private lawsuit. The issues involved in that controversy, even if newsworthy, were purely private in nature and were unlikely, upon resolution, to have any significant impact beyond the parties immediately involved. Further, in relation to this lawslit Bagley sought no public audience and did not attempt to use the court's forum to influence the resolution of any issue being considered by the Subcommittee. *See Time, Inc.,* 424 U.S. at 454 n.3. This purely private dispute is neither a "public" controversy nor does Bagley's involvement in it label him a public figure. *Id.* at 454.

We also reject IBP's contention for a more fundamental reason. Namely. the activities relied on by IBP were distinct from and unrelated to Bagley's involve-

ment in the particular public controversy "giving rise" to the Peterson letter. Very simply, Bagley's meetings with various individuals as well as his involvement in IBP's lawsuit seeking to recover the IBP documents impacted no issue before the Subcommittee and involved a purely private controversy of no interest to the Subcommittee. Congressman Smith, in opening the July hearings, expressly stated that the Subcommittee was "not interested directly or indirectly or even remotely in [Bagley's legal] skirmishes [with IBP]." *Small Business Problems in Marketing of Meat and Other Commodities*, 96th Cong., 1st Sess. at 5. In large part, Bagley is much like the plaintiff in *Gertz* who, despite being active in community and professional service, publishing several books and articles, and representing a client on a civil matter related to the controversy at issue in that case, was insufficiently involved in the particular controversy "giving rise" to the defamation that he could not be classed as a public figure with respect to that "particular controversy." *Gertz*, 418 U.S. at 351-52.

We conclude that although Bagley's various meeting may have "given rise" to IBP's lawsuit against Bagley, those meetings were no part of Bagley's participation in the Subcommittee's investigation. which for purposes of this case is the "particular [public] controversy giving rise to [IBP's defamatory letter]." *Id.* at 352. Rather, these meetings were part of a purely private dispute between IBP and Bagley. Thus given Bagley's limited role in the Subcommittee's investigation of IBP, we conclude that for purposes of this lawsuit Bagley must be considered a private figure.

5. Bagley's Libel Judgment

Having concluded that Bagley is a private figure and further because the speech here at issue involves matters of public concern, *see Dunn & Bradstreet, Inc.*, 105 S. Ct. at 2947, we are now in a position to identify the elements of recovery constitutionally necessary to support Bagley's libel judgment. First, in light of *Hepps*, Bagley must prove IBP's statements that Bagley "stole" documents and committed "perjury" were in fact false. *Hepps*, 106 St. Ct. at 1563-64. Second, Bagley must establish that IBP was at "fault" in publishing these statements. *Gertz*, 418 U.S. at 347. Finally, to recover presumed or punitive damages, Bagley, in addition to proving falsity, *Hepps*, 106 S. Ct. at 1563, must prove by clear and convincing evidence that IBP's actions in publishing the challenged statements constituted "actual malice" as defined in *New York Times*. With the components necessary to support Bagley's judgment now identified, we conclude that Bagley's libel judgment must be reversed.

At trial, the district court determined the statements in IBP's letter that Bagley "stole" documents and committed "perjury" in his congressional testimony were libelous per se and thus under Iowa law were presumed false. On that basis, and over objection, the district court instructed the jury that to avoid liability IBP, by a preponderance of the evidence, must prove that the statements challenged were in fact true.

As we previously noted, the Supreme Court has now made clear that in *Gertz*-type cases the plaintiff must bear the burden of proving that the challenged statements were false. *Hepps*, 106 S. Ct. at 1563-64. Thus, because

Bagley was not required to prove the falsity of IBP's statements as required by *Hepps*, Bagley's libel judgment must be reversed unless this court can determine that this failure constituted harmless error.

Bagley argues that any error is harmless in light of proper punitive damage instructions and a separate, identifiable award of punitive damages. While a separate award of punitive damages supported by proper instructions and a proper showing of proof may in certain cases render an erroneous compensatory damage instruction harmless, *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 166 (1967) (Warren, C.J., concurring), we conclude that such is not the case in the present action.

Consistent with *Gertz*, the district court instructed the jury that Bagley could recover punitive damages only if he demonstrated by "clear and convincing" evidence that IBP's actions were motivated by actual malice. Trial Court Instruction No. 27; *see Gertz*, 418 U.S. at 348-50. Further, the district court properly defined malice as "[a] publication * * * made with * * * knowledge that it is false, or with reckless disregard of whether it was false or not." Trial Court Instruction No. 28; *see New York Times Co.*, 376 U.S. at 279-80.

These instructions, however, while requiring Bagley to prove actual malice, do not specifically require Bagley to prove that the challenged statements were false. And, in *Hepps*, the Supreme Court made clear not only that proof of falsity was an additional component that must be borne by all first amendment defamation plaintiffs, but that fault and falsity are two separate and distinct elements of recovery. *Hepps*, 106 S. Ct. at 1561-65.

Here, the only express instruction of the district court dealing with the burden of proving truth or falsity placed the burden squarely on IBP. Trial Court Instruction No. 9. The district court's instructions on punitive damages, while distinct from the liability instructions, are entirely silent on the issue of truth or falsity. Trial Court Instructions Nos. 27-29. Thus, this court is unable reasonably to determine whether the jury's award of punitive damages flowed from the preliminary conclusion that Bagley proved the falsity of the challenged statements or that IBP had simply failed to prove their truth. And, as *Hepps* makes clear, a proper allocation of the burden of proving falsity is a constitutional requirement. *Hepps*, 106 S. Ct. at 1563-65.

Because we cannot reasonably conclude the punitive damage award reflected a finding of falsity on the part of the jury and as a result was untainted by the burden of proof instruction contained elsewhere in the district court's instructions, it is impossible to determine whether the award was made on a permissible or impermissible basis. Thus, the punitive damage award cannot serve to render the prior error harmless, and Bagley's libel judgment must be reversed and that claim remanded for a new trial. *See New York Times Co.*, 376 U.S. at 284; *see also Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 11 (1970).

Given the need for a new trial based upon Bagley's status as a private person and because any judgment for actual damages recovered by Bagley will not depend on an actual malice determination, we need not independently review the record for evidence of actual malice. *See Bose*

Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 511 (1985). At that trial, Bagley will undoubtedly present any and all evidence of fault, including evidence of actual malice, then available to him. Once this evidence has been presented, the district court, bearing in mind the exacting standard applicable to questions of actual malice, will be in a position to determine whether Bagley's claim for punitive damages can properly be considered by the jury.

We also have no need to address IBP's various evidentiary challenges. We do note, however, that the rulings challenged by IBP, even if erroneous, were not so prejudicial as to deny IBP a fair trial and require the reversal of Bagley's other judgments. On retrial of Bagley's libel claim, IBP is free to challenge again the court's rulings, and, in light of the relatively narrow issues to be tried, the district court should consider not only whether this evidence is relevant to the issues being tried but also whether the probative value of these various pieces of evidence is sufficient to outweigh their potentially prejudicial effect.

B. Tortious Interference

We now turn to IBP's challenge to Bagley's claim of tortious interference with present employment. The jury awarded Bagley $150,000 in compensatory damages and $500,000 in punitive damages on that claim. With one modification relating to the district court's award of prejudgment interest, we affirm.

At the time of his testimony before the Subcommittee, Bagley was employed by Dubuque Packing Company

(Dubuque), a competitor as well as a rival of IBP. Six days after his testimony, Bagley was abruptly and without warning fired by Dubuque. At trial, Bagley presented several pieces of evidence from which a jury could have concluded that certain actions on the part of IBP were the cause of his firing. Although IBP presented evidence that Bagley's firing was unrelated to any action on the part of IBP, the jury obviously rejected IBP's evidence and accepted Bagley's.

Because Bagley's position is not without substantial support, we are in no position to second-guess the jury that heard and was in a position to weigh the competing evidence. IBP, in its brief, essentially concedes the competing evidence created a question of fact to be resolved by the jury. Appellant's Brief at 66. Thus, we conclude the judgment in favor of tortious interference with existing employment must stand.

We turn next to IBP's challenge to the district court's judgment in favor of Bagley on his claim of tortious interference with future employment opportunities. The jury awarded Bagley $100,000 in compensatory damages and $250,000 in punitive damages on that claim. We affirm the determination of liability on this claim, but remand the claim to the district court with instructions.

As an initial point, IBP argues that Bagley's claim of tortious interference with future employment opportunities is duplicative of his libel claim and thus provides no independent basis of recovery. Because we conclude that facts separate and apart from Bagley's libel claim support his tortious interference with future employment claim, we reject IBP's position.

From the evidence presented at trial, the jury could reasonably have found the following facts. Prior to his congressional testimony, Bagley was highly regarded in the meat industry, had a good reputation for honesty, ability, and integrity, and received numerous offers of employment. After that testimony, however, Bagley was fired from Dubuque at IBP's instigation. Further, Bagley was effectively "blacklisted" from the meat industry as a whole by IBP, and it was made clear to Bagley that he would never work in the meat industry again. The offers of employment stopped and, with one minor exception, Bagley has not again been able to obtain work in the meat industry.

These findings support the jury's determination of liability in favor of Bagley on this claim and would ordinarily justify an affirmance of the damages awarded. However, we agree with IBP that Bagley's recovery of damages on this claim has the potential to be duplicative of whatever damages Bagley may eventually recover on retrial of his libel claim. Consequently, we vacate that portion of the judgment awarding damages on the claim of tortious interference with future employment opportunities and remand that claim to the district court subject to the ultimate resolution of Bagley's libel claim.

If Bagley fails to recover on his libel claim, the award of damages should be reinstated. If Bagley recovers on his libel claim, however, the district court should then determine to what extent a recovery for tortious interference with future employment would duplicate his libel recovery. To the extent of any duplication, the award of damages on that tortious interference claim should not be reinstated.

Finally, with respect to each of Bagley's three claims, IBP challenges the district court's award of prejudgment interest to Bagley on the punitive damage awards recovered by him. Specifically, IBP argues that the district court erred in awarding prejudgment interest on those awards. After considering this issue of Iowa state law, *Sedco International v. Cory,* 683 F.2d 1201, 1212 (8th Cir.). *cert. denied,* 459 U.S. 1017 (1982), we agree.

Although unclear at the time of the district court's ruling, the Supreme Court of Iowa has now held that prejudgment interest may not be recovered on an award of punitive damages. *Midwest Management Corp. v. Stephens,* 353 N.W.2d 76, 82 (Iowa 1984). Thus, we reverse the district court's award of prejudgment interest on Bagley's punitive damage awards.

III. Conclusion

We reverse Bagley's libel judgment and remand that claim for a new trial. With one exception, we affirm the district court judgment and award of damages on Bagley's claim of tortious interference with present employment. Finally, we affirm the district court judgment with respect to Bagley's claim of tortious interference with future employment opportunities to the extent of liability; however, because this recovery has the potential of being duplicative of any award that might be recovered by Bagley on his libel claim, we vacate that portion of the judgment and remand that claim to the district court with instructions.

BRIGHT, Senior Circuit Judge, and McMILLIAN and ARNOLD, Circuit Judges, concurring in part and dissenting in part.

We agree with the majority's conclusion that the district court erred in the libel action by placing on IBP the burden of proving that Bagley "stole" the documents and committed "perjury." We further agree that this allocation of the burden of proof did not constitute harmless error. *See Philadelphia Newspapers, Inc. v. Hepps,* 106 S. Ct. 1158 (1986). We therefore concur in the majority's decision to reverse the libel judgment for Bagley, and remand the action to the district court (Majority Opinion at 27-29).

We also concur with the majority's holding rejecting IBP's claim to a common law privilege (Majority Opinion at 11-13) and with its conclusion that IBP's activities constituted genuine petitioning activity (Majority Opinion at 13-17). Finally, we agree that the judgment for Bagley on his action for tortious interference with present employment should be sustained, subject to striking the prejudgment interest on the punitive damages award. *See* Majority Opinion at 30-32.

In other respects outlined in this dissent, we disagree with the majority.

Our views on all issues before this en banc court have been fully addressed in the opinion authored by Judge Bright for the panel majority that initially heard and decided this case. *Bagley v. Iowa Beef Processors, Inc.,* 755 F.2d 1300 (8th Cir. 1985). We need not again repeat that opinion here. We expressly adopt the opinion of the

panel,[1] and as stated in that opinion, we would hold that Bagley, for the libel action, occupies a status analogous to a limited figure in a media case and therefore must bear the burden of proving IBP made the statements here in question with "actual malice." *Id.* at 1314-17; *see New York Times v. Sullivan*, 376 U.S. 254.

We would therefore remand this case to the district court for a determination, from the record, whether Bagley submitted sufficient evidence for a jury to find that IBP acted with actual malice. 755 F.2d at 1317. If the district court concludes that Bagley produced sufficient evidence, there should be a new trial on the libel action with Bagley bearing the burden of proving actual malice to establish liability for the alleged defamation.

With respect to the propriety of the claim for tortious interference with future employment (Majority Opinion at 30-32), we disagree that the determination of liability should stand. In our view, that award will not stand as a claim separate from the cause of action for libel. As we stated previously, "[i]f on remand, Bagley establishes IBP's liability for libel, he should be allowed to recover for the adverse impact on his future employability." 755 F.2d at 1318.

Thus, in remanding for a new trial, we would direct the district court to proceed in a manner consistent with

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[1]We observe that the analysis of the panel on Bagley's libel claim has received support from subsequent decisions of the Supreme Court. *See Philadelphia Newspapers, Inc. v. Hepps*, 106 S.Ct. 1558 (1986); *McDonald v. Smith*, 105 S.Ct. 2787 (1985).

the opinion of the panel initially hearing this case and reported at 755 F.2d 1300 (8th Cir. 1985).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

IN RE: M.D.L. 428

IBP CONFIDENTIAL
BUSINESS
DOCUMENTS LITIGATION

HUGHES A. BAGLEY NO. C-79-4087

Plaintiff,

vs. ORDER
(Filed June 24, 1983)

IOWA BEEF
PROCESSORS, INC.,

Defendant.

This matter is before the court on plaintiff's resisted motion for sanctions, filed August 25, 1982, his resisted motion to alter or amend judgment, filed January 10, 1983, and defendant's resisted motion for judgment notwithstanding the verdict or alternatively for a new trial, filed January 10, 1983. Ruling in accordance with text of order.

This case was treid to the jury from December 13, 1982 through December 29, 1982. The jury returned its verdict in favor of plaintiff on December 30, 1982. Compensatory damages were set at $1,500,000; punitive damages were set at $7,250,000.

The first motion to be considered is plaintiff's motion for sanctions against defendant. In this motion, plaintiff complains that defendant was not prepared for a final pre-trial conference scheduled for July 22, 1982. Due to defendant's lack of preparation. plaintiff claims

his attorneys wasted both time and money in attending the conference.

Defendant argues that as of the date of the conference, there were a number of motions, some dispositive, that were still pending. In addition, defendant maintains that scheduling difficulties on both sides prevented the parties from completing a polished pre-trial order. Defendant argues that a combination of these and other factors prevented both sides from being fully prepared to assemble a final pre-trial order.

The court does not feel that in this case sanctions would be appropriate. First, as defendant noted, some difficulty existed in framing the issues and determining which witnesses would be listed since motions were pending before the court. Second, while it appears that at the final pre-trial conference defendant was not fully prepared, *both* defendant's and plaintiff's schedules precluded any productive meeting before the conference. The court finds this contributed significantly to the problem. Finally, in light of the verdict and the court's ruling below, the court concludes that imposition of sanctions would be unfair. Accordingly, plaintiff's motion is denied.

In his motion to alter or amend the judgment, plaintiff requests that the court allow an interest rate of 10% rather than the previously set rate of 8.75% and that the interest accrue from the date of commencement of plaintiff's action rather than the date of the entry of judgment.

Defendant vigorously resists the motion. Defendant argues that recovery of prejudgment interest on future

damages is improper since the jury was instructed to compute those damages from the date of the verdict rather than from the date the complaint was filed. Defendant also argues that plaintiff should not receive prejudgment interest for damages he suffered after the filing of his lawsuit. Finally, defendant maintains plaintiff cannot recover prejudgment interest on the punitive damages award.

At the outset, the court notes that Iowa law governs the amount of interest due on the judgment. *Sedco International, S.A. v. Cory*, 683 F.2d 1201, 1212 (8th Cir.), cert. denied, — U.S. —, 103 S.Ct. 379 (1982).

The Iowa legislature, in response to delays in appeals, has provided a fixed interest rate of 10% per year on all judgments, to be computed from the date the petition (or complaint) was filed. *Janda v. Iowa Industrial Hydraulics, Inc.*, 326 NW2d 339, 344 (Iowa 1982); *Iowa Code* § 535.3 (1983).[1]

The court finds defendant's arguments to be without merit and that plaintiff should be allowed a rate of 10% per year, to accrue from the date of filing of the complaint. The language in the statute is straightforward and not of a precatory nature. The court refuses to frustrate legislative intent by ignoring its clear mandate.

In defendant's motion for judgment notwithstanding the verdict or alternatively for a new trial, the court has

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[1] *Iowa Code* § 535.3 (1983) provides in pertinent part:

> *Interest on judgments and decrees.* Interest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year . . . The interest shall accrue from the date of the commencement of the action.

encountered difficulty in framing its ruling. Defendant's motion and memorandum merely sets out numerous propositions followed by lists of citations. Defendant submits no argument to the court identifying salient points or illustrating the application of cases to propositions. While brevity is a virtue the court admires, the court is not going to respond in detail to the fifty plus cursory points raised by defendant. Instead, the court will consider in depth those objections raised by defendant which have merit or those where substantial controversy exists.

The standard for ruling on a motion for judgment notwithstanding the verdict is whether the verdict of the jury is supported by substantial evidence. *See, Tackett v. Kidder,* 616 F.2d 1050, 1053 (8th Cir. 1980); *Singer Co. v. E.I. du Pont de Nemours & Co.,* 579 F.2d 433, 440 (8th Cir. 1978); *Duncan v. St. Louis-San Francisco Railway Co.,* 480 F.2d 79, 83 (8th Cir. 1973), cert. denied, 414 U.S. 859 (1973); *Marcoux v. Mid-States Livestock, Inc.,* 429 F. Supp. 155, 158 (N.D. Iowa 1977), *aff'd,* 572 F.2d 651 (8th Cir. 1978), cert. denied, 439 U.S. 801 (1978). The substantial evidence rule requires that the jury verdict be supported by more than a mere "scintilla" of evidence. *Singer,* 579 F.2d at 440; *Marcoux,* 429 F.Supp. at 158-59. In making this determination, the court must examine the record and review the testimony, but it may not assign credibility or weight to the witnesses and evidence. *Singer,* 579 F.2d at 441; *Simpson v. Skelly Oil Co.,* 371 F.2d 563, 567 (8th Cir. 1967). *See also, Thieman v. Johnson,* 257 F.2d 129, 132 (8th Cir. 1958). The court may not substitute its judgment of the facts for that of the jury, and it must view the evidence in the light most favorable to the plaintiff. *Tennant v. Peoria & P.U. Railway Co.,* 321 U.S. 29, 35

(1944); *Russell v. United Parcel Service, Inc.*, 666 F.2d 1188, 1191 n.5 (8th Cir. 1981) (quoting Blackmun, J. in *Hanson v. Ford Motor Co.*, 278 F.2d 586, 596 (8th Cir. 1960)). As a result, motions for judgment notwithstanding the verdict are sparingly granted, and then "only where the evidence points *all one way* and is susceptible of *no* reasonable inferences sustaining the position of the nonmoving party." *Giordano v. Lee*, 434 F.2d 1227, 1231 (9th Cir. 1970), cert. denied, 403 U.S. 931 (1971) (emphasis is original). *Accord, Freeman v. Franzen*, 695 F.2d 485, 488 (7th Cir. 1982). *See also*, 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶50.07[2] (2d ed. 1982).

In ruling on a motion for new trial, Rule 59 of the Federal Rules of Civil Procedure provides that a new trial may be granted in an action where there has been a jury trial for any of the reasons "for which new trials have heretofore been granted in actions at law in the courts of the United States." FRCP 59(a).

Motions for a new trial are independent from motions for judgment notwithstanding the verdict; they are governed by different legal principles, and trial courts have greater latitude in ruling on them than they do in ruling on motions for judgment notwithstanding the verdict. *Nodak Oil Co. v. Mobil Oil Corp.*, 533 F.2d 401, 410 (8th Cir. 1976). Indeed, in considering such a motion, the trial court is governed by its sound discretion. E.g. *Bates v. Hensley*, 414 F.2d 1006 (1st Cir. 1969). As a general proposition, though, new trials are not granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. *Seven Provinces Ins. Co. Ltd. v. Commerce & Industry Ins. Co.*, 65 FRD 674, 688 (N.D. Mo. 1975); 11 C. Wright & A. Miller,

Federal Practice & Procedure § 2308, at 32 (1973) (*Wright & Miller*). It is axiomatic that the burden of proving the propriety of a new trial rests squarely with the moving party. *Hansen v. Barrett,* 186 F.Supp. 527, 532 (D.Minn. 1960); 11 *Wright & Miller* § 2308 at 32.

As indicated in FRCP 59(a), there exists no precise or definitive list of grounds for a new trial. It is clear, however, that the court, as a prerequisite to granting a new trial on any ground, must satisfy itself that the error or defect in the earlier trial affected the "substantial rights" of defendant. FRCP 61; 11 *Wright & Miller* § 2305, at 41.

Generally, defendant argues that the jury verdict was entered in derogation of defendant's first amendment rights. Defendant points out that its letter to the Smith subcommittee was both absolutely and qualifiedly privileged. Defendant contends the letter was absolutely privileged since, one, the letter constituted testimony before Congress and, two, the letter was an exercise of its first amendment right to petition the government to influence legislation. Defendant argues that the letter was qualifiedly privileged as defendant had a right to reply to serious allegations made against it and that defendant also had a first amendment right to comment on limited public figures.[2]

In Iowa, the law provides that privileged communications fall into two categories: 1) those that are absolutely privileged, and (2) those that are conditionally or quali-

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[2]The court notes that in this diversity action, Iowa law provides governing principles. *See generally, Asay v. Hallmark Cards, Inc.,* 594 F.2d 692, 697 (8th Cir. 1979).

fiedly privileged. *Vojak v. Jensen,* 161 NW2d 100, 105 (Iowa 1968); *Mills v. Denny,* 245 Iowa 584, 63 NW2d 222, 224 (1954); *Fleagle v. Goddard,* 188 Iowa 1033, 177 NW 51, 52 (1920). *See also* 50 Am.Jur.2d *Libel and Slander* § 192 (1970).

The foundation upon which the doctrine of privileged communications rests is public policy. Upon the proper occasion, interests of society will dictate protection for a defamer from liability. It is at these times that the law favors the common welfare of the public over private individual rights. *Mills,* 63 NW2d at 224; *Fleagle,* 177 NW at 52 (quoting *Newell on Slander and Libel* §§ 492, 493). It is true, however, that the boundaries of an absolute privilege are narrowly drawn. 50 Am.Jur.2d *Libel and Slander* § 194 (1970).

In advancing its legislative testimony privilege, defendant relies upon § 590A of the Restatement (Second) of Torts:

> Witnesses in Legislative Proceedings
>
> A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.

In this case, defendant fails to bring itself under the protective umbrella of this privilege. The evidence shows

that defendant never sent a representative to the Congressional subcommittee hearings to testify in person.[3]

As a result, Congressman Smith did not place defendant's letter into the record. It is clear that defendant's actions took place away from the legislative proceeding in a non-testimonial context. Given the strict application of absolute privileges, defendant's argument that the court should have adopted the § 590A privilege lacks merit.

Defendant next argues that the letter was absolutely privileged since it is entitled to exercise its first amendment right to petition the government to influence legislation under the *Noerr-Pennington* doctrine.[4]

The basis for defendant's claim of privilege originates with *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr*, defendant railroads conducted a publicity campaign designed to influence the passage of state laws detrimental to truckers. *Noerr*, 365 U.S. at 131. The truckers filed suit, alleging violations of the Sherman Act.[5] 365 U.S. at 129. The Supreme Court held there was not a violation of the Sherman Act since "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135. Central to the Su-

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[3]In fact, in a letter dated June 29, 1979, Congressman Neal Smith invited Robert L. Peterson, IBP President, to appear under oath and testify before the subcommittee pursuant to committee procedure. This offer was refused and instead the letter was sent.

[4]*See United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[5]15 USC § 1, et seq.

preme Court's holding was the recognition of a citizen's right to petition the government. *See* 365 U.S. at 139.

In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Supreme Court reiterated its *Noerr* antitrust immunity position. There it was held, *inter alia*, that concerted efforts to influence public officials do not violate antitrust laws, even though elimination of competition is the desired effect. 381 U.S. at 670.

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the court held that the *Noerr-Pennington* doctrine also applies to groups petitioning administrative agencies (both legislative and executive). 404 U.S. at 510. The court concluded that the right to petition extends to all departments of the government. *Id.*

California Motor Transport Co. is significant, however, since it first confirmed the application of the so-called sham exception set out in *Noerr*.[6] *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 295 (8th Cir. 1978). In *California Motor Transport Co.*, the Supreme Court recognized that certain forms of illegal and reprehensible conduct may result in antitrust violations, 404 U.S. at 513, and that first amendment rights "may not be

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[6]In *Noerr*, the Supreme Court recognized a sham exception to the privilege:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

365 U.S. at 144.

used as the means or the pretext for achieving 'substantive evils' [citation omitted] which the legislature has the power to control." 404 U.S. at 515. This discussion makes clear that the essential element of the sham exception is the intent to injure a competitor directly through the lack of a genuine effort to influence government. *See, Mark Aero, Inc.*, 580 F.2d at 295.

The court does not agree with defendant that it should have an absolute privilege under the *Noerr-Pennington* doctrine for the Peterson letter. The court concludes that application of the doctrine would constitute an unwarranted extension of settled principles.

Examination of the evolution of the *Noerr-Pennington* doctrine and the applicability of it today illustrates the fact that its usage is normally confined to antitrust questions or those situations otherwise related to practices between competing business entities. *See* e.g. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982); *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), cert. denied, — U.S. —, 103 S. Ct. 814 (1983); *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir.), cert. denied, 449 U.S. 1063 (1980); *State of Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980); *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir.

1978). However, authority does exist which indicates that a claim of privilege under the *Noerr-Pennington* doctrine may be allowed in causes of actions other than antitrust. *See Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643, 649-50 (7th Cir. 1983); *Suburban Restoration Co., Inc. v. Acmat Corporation*, 700 F.2d 98, 101 (2d Cir. 1983); *First National Bank of Omaha v. Marquette National Bank of Minneapolis*, 482 F.Supp. 514, 524-25 (D.Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 1981); *Sierra Club v. Butz*, 349 F.Supp. 934, 938 (N.D. Cal. 1972).

The difficulty with defendant's position is that there are no cases, either cited by defendant or found by the court, which indicates that in an action for libel, the defendant may interpose a defense based upon the privilege set forth under the *Noerr-Pennington* doctrine. Defendant's attempted use of the privilege strays far from the context in which the privilege originated and the reasons behind the allowance of antitrust immunity. The court finds that, at the threshold, application would be inappropriate. *See generally, International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d at 1267 n.14.

Assuming arguendo, however, that the *Noerr-Pennington* doctrine applies to libel claims in this posture, the court finds that the actions of the defendant fall within the sham exception. Defendant's actions were not motivated by a genuine desire to influence legislation, but rather by a desire to cause plaintiff harm. This is not a case where two competing industries are engaged in a "no-holds-barred fight," having mustered all of their political and economic power in order to influence the

legislative process. *See Noerr,* 365 U.S. at 144-45. Rather, here a large corporation is matched against a former employee. Defendant always had the opportunity to appear before the Congressional subcommittee and testify as plaintiff did. Rather, it chose to send a letter and caused it to be published which attacked plaintiff personally. The court cannot say it erred when application of the privilege was denied. Cf. *Westborough Mall, Inc. v. City of Cape Girardeau, Missouri,* 693 F.2d 733, 745-46 (8th Cir. 1982) (*Noerr* offers no protection where legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions).

In addition to the absolute privileges claimed above, defendant argues that the defamatory communication was qualifiedly or conditionally privileged as well. Defendant argues first that it had a right to reply to serious allegations made against it.

As a general proposition, declarations made in an honest endeavor to vindicate one's character or to protect one's interests are qualifiedly privileged even though they are false. 50 Am.Jur.2d *Libel and Slander* § 210 (1970). The defendant may publish, in an appropriate manner, anything which reasonably appears necessary to defend his own reputation. W. Prosser, *Law of Torts,* § 115 at 786 (4th ed. 1971) (Prosser). The Restatement (Second) of Torts characterizes the privilege in the following manner:

> *Protection of the Publisher's Interest*
>
> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

(a) there is information that affects a sufficiently important interest of the publisher, and

(b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

Restatement (Second) of Torts, § 594 (1977).

In the instant case, defendant failed to meet its burden in showing its entitlement to the privilege. Cf. *Brown v. First National Bank of Mason City*, 193 NW2d 547, 552 (Iowa 1972). The court determined that the occasion upon which the defendant published the letter did not give rise to a qualified privilege. *See* Restatement (Second) of Torts, § 619 (1977).

Central to the court's ruling in this regard is defendant's questionable good faith. In order to avail itself of the privilege, the dissemination of the defamatory statement must be done in an "appropriate manner." Prosser at 786. Here, defendant chose not to respond to plaintiff by testifying under oath subject to the subcommittee procedure. Instead, defendant submitted a written response which was published in part through the media generally for the public and in particular for those in the meat industry. It seems clear that the method of publication was such that most recipients of the defamatory matter were not in a position to render legitimate assistance to defendant. *See* Prosser at 787. In light of the circumstances surrounding the letter written and published by defendant, it would be unjust for defendant to avail itself of this qualified privilege.

Defendant's final request for a qualified privilege is based upon the constitution. Defendant maintains that it

is qualifiedly privileged to comment upon public figures or limited public figures such as plaintiff.

The seminal case of *New York Times v. Sullivan*, 376 U.S. 254 (1964) held that the First and Fourteenth Amendments required that those who criticize public officials be afforded a qualified privilege to do so. *Sullivan*, 376 U.S. at 282-83. The Supreme Court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80.[7] *See also Brown v. Herald Co., Inc.*, 698 F.2d 949, 951 (8th Cir. 1983).

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Supreme Court extended the constitutional privilege enunciated in *Sullivan* to defamatory criticism of public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 (1974). In the instant case, defendants argue that plaintiff was a limited public figure and that the letter was

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[7]In an attempt to illustrate the meaning of this standard the Supreme Court has stated:

> [It is] clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

qualifiedly privileged since it constituted criticism of plaintiff.

In *Gertz v. Robert Welch, Inc.*, supra, the Supreme Court held that a media defendant that published defamatory material about an individual who was neither a public figure nor a public official could not claim a constitutional privilege for the injury caused by the statements. 418 U.S. at 332, 351-52.[8] In its opinion, the Supreme Court identified several important reasons for distinguishing among public and private plaintiffs. First, public officials and public figures usually have greater access to channels of effective communication and therefore may be able to counteract or rebut false or defamatory statements. *Id.* at 344. The court reasoned that close scrutiny must be accepted by public officials and public figures as a consequence of their involvement in public matters. *Id.* In addition, the media is entitled to assume that those individuals have voluntarily placed themselves in the public eye and the increased risk which follows from it. *Id.* at 345. However, with regard to private plaintiffs, the Supreme Court opined that they "are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." *Id.*

Whether or not defendant in the instant case could have properly enjoyed a constitutional privilege turns on whether or not plaintiff could have been characterized as a limited public figure. The court holds that plaintiff was not.

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[8]*See also Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 164 (1979).

In determining whether plaintiff was a limited public figure, the court utilizes a two-pronged analysis originally established under *Gertz*. First, a determination must be made that a public controversy exists. Second, the court must examine and measure the nature and extent of plaintiff's participation in the particular controversy. *Clark v. American Broadcasting Companies, Inc.*, 684 F.2d 1208, 1218 (6th Cir. 1982). In this regard, the court focuses on whether plaintiff has placed himself at the forefront of the controversy in order to affect the resolution of the issues involved. *Gertz*, 418 U.S. at 345; *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 165 (1979).

Here, the court holds a public controversy existed. Many events occurred during the latter part of the 1970's which illustrated the nature of the controversy. In 1977, defendant sued plaintiff seeking, in part, injunctive relief. Defendant alleged plaintiff disseminated confidential documents. In 1979, plaintiff filed this action against defendant. During this period, Congress conducted investigations into practices in the meat industry. In addition, the MPIA antitrust litigation continued. It is clear that the public had a clear interest in the unfolding events.

Having established the existence of a public controversy, the court looks to the nature of plaintiff's participation. The court finds that plaintiff did not voluntarily inject himself into the controversy. Plaintiff was terminated from defendant's employ in 1975. In 1977, it was defendant who sued plaintiff. In 1979, plaintiff's testimony before Congress, which precipitated the Peterson letter, was given pursuant to congressional subpoena. Following his testimony, plaintiff consciously avoided giving

comment in the press. The court cannot say that plaintiff voluntarily thrust himself into the controversy.

Unlike defendant, who is the largest processor of meat in the world, plaintiff did not have access to channels of effective communication in order to refute or minimize defamatory statements. Although at times plaintiff had contact with the media, he did not possess "the regular and continuing access to the media that is one of the accouterments of having become a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979).

Finally, although plaintiff's part in this saga is not insignificant, it cannot be said that plaintiff was the primary actor. This particular controversy involved a number of groups and persons, each with varying degrees of participation. Plaintiff was but one in a cast of many.

The court concludes, therefore, that since plaintiff cannot be characterized as a limited public figure, defendant is not able to claim a constitutional privilege to criticize. *See, Clark v. American Broadcasting Companies, Inc.*, 684 F.2d 1208, 1219 (6th Cir. 1982) (observing that Supreme Court has refused to extend actual malice requirement of *New York Times v. Sullivan* to plaintiffs who are neither public officials nor public figures).

Defendant's next argument concerns the submission of the court's instruction number nine to the jury. Specifically defendant states that the instruction "unconstitutionally interjected a presumption of falsity of the alleged libel, shifted the burden of proof from plaintiff to IBP, and authorized a presumption of injury and damages."

In its instruction number nine, the court embodied in part, the Iowa common law of defamation. *See, Sheibley*

v. Ashton, 130 Iowa 195, 106 NW 618, 619 (1906). The court retained the concept of libel *per se,* which naturally includes the attendant presumption. *See, Vojak v. Jensen,* 161 NW2d 100, 104 (Iowa 1978).

It is the court's understanding that defendant seeks application of the *Gertz* standards in this case. The court declines to do so here, where there is a private plaintiff and a private defendant.

It seems clear that the scope of the *Gertz* standards protects only those defendants who are "publishers or broadcasters." *Gertz,* 418 U.S. at 341; *See* Note, *Iowa Libel Law and the First Amendment: Defamation Displaced,* 62 Iowa L.Rev. 1067, 1085-86 (1977). In actions between private individuals, the law of libel remains unchanged. Here, the court declines to alter or extend this result. *See Id.* at 1101.

Defendant's next substantive argument deals with duplicative damages. Defendant maintains that plaintiff was awarded damages under both the libel and false light theories for identical injuries resulting from the Peterson letter.[9]

Plaintiff argues that libel and invasion of privacy are recognized in Iowa as two separate causes of action. In plaintiff's view, since both causes of action seek to protect different interests, a recovery under each theory should not be considered duplicitous.

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[9]In this case, plaintiff was awarded $1,000,000 in actual and $5,000,000 in punitive damages under the libel claim and $250,000 in actual and $1,500,000 in punitive under the invasion of privacy claim.

At the outset, plaintiff is correct when he asserts that Iowa recognizes both torts and that they may be considered separate and distinct. *Anderson v. Low Rent Housing Commission of Muscatine,* 304 NW2d 239, 248 (Iowa), *cert. denied,* 454 U.S. 1086 (1981). In this regard it can be noted that Iowa has adopted the principles of the Restatement (Second) of Torts § 652A (1977). *Id.*

In examining the situation at hand, the court notes that in cases such as these, the theory of recovery is to award only that compensation which is fair and reasonable, and no more. 50 Am.Jur.2d *Libel and Slander* § 356 (1970).

In the instant case, the court agrees with defendant on this point and holds that where plaintiff recovers under theories of defamation and invasion of privacy for a *single occurrence,*[10] then plaintiff has reaped a double recovery for the same wrong. 50 Am.Jur.2d *Libel and Slander* § 356 (1970). In the Restatement (Second) of Torts it is noted:

> The interest protected by this Section [§ 652E. Publicity Placing Person in False Light] is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander under the rules stated in Chapter 24. In such a case the action for invasion of privacy will afford an alterna-

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[10]It is uncontroverted that the libel and invasion of privacy are based upon a single incident, namely the publication of the Peterson letter.

> tive or additional remedy, and the plaintiff can proceed upon either theory, or both, *although he can have but one recovery for a single instance of publicity.* (emphasis added).

Restatement (Second) of Torts § 652E comment b (1977). *See also, Team Central, Inc. v. Teamco. Inc.*, 271 NW2d 914, 925 (Iowa 1978) ("The purpose of damages is to restore an injured party to the position he enjoyed before his injury. Duplicate or overlapping damages are to be avoided."); Prosser at 814.

Accordingly, the court will grant defendant judgment notwithstanding the verdict on plaintiff's claim for invasion of privacy.

Defendant next argues that as a matter of law, it is not liable for intentional interference with plaintiff's future employment. Defendant maintains that plaintiff failed to show the existence of any employment opportunities which defendant interfered with. Defendant reasons that as a result, the jury's verdict could only have been a product of passion and prejudice.

Plaintiff rejects defendant's arguments and maintains that the claim of tortious interference with prospective contracts was properly submitted to the jury. Plaintiff points out that several of defendant's own witnesses, coupled with plaintiff's own testimony provides substantial evidence of the interference for the jury.

The tort of intentional interference with prospective relations was specifically recognized and adopted by the Iowa Supreme Court in *Clark v. Figge*, 181 NW2d 211, 214 (Iowa 1970). In the instant case, the court instructed the

jury that the tort was comprised of the following elements: (1) that the plaintiff had prospective contractual relations with future employers; (2) that defendant knew of such relations and intentionally interfered with them; (3) that such acts caused future employers not to enter into or continue such relations; and (4) that as a proximate result of defendant's actions, plaintiff sustained damages. *See Stoller Fisheries, Inc. v. American Title Insurance Co.*, 258 NW2d 336, 340 (Iowa 1977); Restatement (Second) of Torts § 766B (1979).[11]

The fighting issue here is whether or not plaintiff has sufficiently identified or articulated those prospective relations which were interfered with. In this case, plaintiff presented no evidence of defendant interfering with any *particular* prospective employer. Plaintiff only generally averred that defendant interfered with future employers and points to plaintiff's inability to find meaningful em-

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[11]The Restatement (Second) sets forth the salient elements of the tort:

> Intentional Interference with Prospective Contractual Relation
>
> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Restatement (Second) of Torts § 776B (1979).

ployment in the meat industry as evidence of defendant's tortious interference.[12]

The court holds that defendant should not be granted judgment notwithstanding the verdict. The expression, "prospective contractual relation" and other like terms, are not to be construed in a strict or technical sense. *See,* Restatement (Second) of Torts § 776B comment c (1979). It is not necessary for plaintiff to specifically identify which prospective employer defendant tortiously interfered with, as the court does not consider that to be an element of the tort. *See, Crinkley v. Dow Jones & Co.*, 67 Ill. App. 869, 24 Ill. Dec. 573, 385 NE2d 714 (1978). Here, plaintiff showed that he was unable to procure employment in the meat industry following his difficulties with defendant. Given the relatively close-knit nature of the meat industry,[13] the court finds plaintiff's showing sufficient.

The final argument by defendant for the court's consideration deals with the damages awarded in this case. Substantively, defendant argues that the punitive damages awarded were outrageously large, and that the "total damages awarded bear no rational relationship to the alleged misconduct and injury."

At the outset, the court does not have any difficulty sustaining the actual damages awarded in this case. Given

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[12]The evidence shows, however, that plaintiff started work with Southwest Beef as President in June, 1981. That employment lasted only about six months, though, as the company experienced severe financial difficulties and ultimately ceased operations.

[13]Testimony established the fact that officers of companies are rather flexible; that is, they move from company to company rather easily.

plaintiff's stature in the meat industry and defendant's actions, the compensatory awards are reasonable.

The more difficult question is whether the punitive damages are excessive.

As a general proposition the purpose of punitive damages is to punish the tortfeasor for his wrongful action and to deter him and others from similar future conduct. To accomplish this, the exemplary damages award must be relatively large. The award is not intended as compensation for the injured party. *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Northrup v. Miles Homes, Inc. of Iowa*, 204 NW2d 850, 861 (Iowa 1973).

It is clear, though, that if the jury's verdict works a plain injustice or is monstrous, the court may exercise its discretion and set aside the award of punitive damages. *See e.g., Herrera v. Valentine*, 653 F.2d 1220, 1231 (8th Cir. 1981). However, the utmost respect must be accorded to the jury's resolution of the matters. The court is not to substitute its view for the view of the jurors. Jurors are particularly well suited for making this type of moral judgment so the court's intrusion should normally be reserved. *Pellowski v. Burke*, 686 F.2d 631, 635 (8th Cir. 1982). *See also, Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 540 (7th Cir. 1982); *Hall v. Montgomery Ward & Co.*, 252 NW2d 421, 426 (Iowa 1977).

Here, although the award of punitive damages is large, the court cannot say that it "shocks" its conscience. The stockholders' equity in defendant is in excess of 290 million dollars. Defendant had sales of over 4 billion dollars. In short, as noted earlier, defendant is the world's largest

meat processor. As such, the court cannot say that $5,750,000 in punitive damages is excessive or outrageous.

It is therefore
ORDERED

1. Motion for sanctions denied.

2. Motion to alter or amend judgment granted.

3. Motion for judgment notwithstanding the verdict or alternatively for a new trial granted in part, denied in part.[14]

June 24, 1983.

/s/ Edward J. McManus, Chief Judge
United States District Court

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[14]For purposes of clarification, the verdict and judgment should now reflect the following damages:

a) Libel
$1,000,000 actual
$5,000,000 punitive

b) Intentional Interference with Contract
$150,000 actual
$500,000 punitive

c) Intentional Interference with Prospective Contracts
$100,000 actual
$250,000 punitive

$7,000,000 Total

APPENDIX C

Index and Summary

Page

Feeders Association have enthusiastically welcomed IBP's proposal to build a new plant. Again, the motive of entrenched packers to preclude new competition was affirmed by their representatives' Freudian slip: They are not afraid of competition unless it affects their area.

Northwest Packers: A cursory and misleading telephone survey by Smith's staff of packers in the Pacific Northwest (the largest—except IBP—being under indictment or accused by the Justice Department of conspiring to fix prices) did not support Smith's conclusion that IBP's entry into the market and joint venture with several feedlots are causing severe problems. Rather, it confirms Secretary Berglund's testimony and the findings of the District Court in Boise that the Northwest cattle and beef industries have improved, competitively, since IBP's entry. 9

The Williams Report: The conclusions of the report on the structure of the beef industry prepared by Doc Williams, a paid consultant to Smith's Subcommittee, are not "alarming" and in fact differ markedly from a tentative draft leaked to the media by Smith with a press release derogatory to IBP. Williams' report is a compendium of statistics that merely proves what everyone in the industry knows: The location of cattle feeding has shifted and packing plants are following the shift. In fact, Williams' predicts that there will be more—rather than less—competition in the future among larger packers like IBP. 12

Hughes Bagley: Smith has furnished a forum for a disgruntled ex-IBP employee to continue his vendetta against IBP. Both while he was at IBP and subsequently, Bagley has stolen IBP documents and misused IBP confidential information to defame and cause problems for IBP. Now, he has made accusations of certain unlawful or questionable conduct, which IBP is rebutting in detail. At best, the incidents Bagley 15

Page

discusses are ancient history and scandal sheet gossip. At worst, they are malicious—even perjurious— attacks on IBP and its customers. IBP has never cheated any customer or granted unlawful preferential discounts to any customer. Indeed, as Bagley himself was forced to admit under questioning by Congressmen Richmond and Evans, IBP has the best product integrity in the industry and should be praised for its efficiency and commitment to boxed beef which has revolutionized the industry, to the benefit of producers and consumers alike. In the end, Bagley's accusations boiled down to a feeling that it is "possible" that IBP had been "a little overzealous" in pursuing its commitment.

Conclusion: It is perverse that the Chairman of a committee concerned with Small Business should fail to appreciate that IBP is a prime example of a small business (founded less than 20 years ago with an SBA loan) which has made good. Instead, the Chairman has chosen to manipulate his hearings to pursue a private vendetta against IBP for the ulterior motives of press coverage and assistance to a friend in pursuing antitrust litigation.

Robert L. Peterson, President August 1, 1979

Congressman Neal Smith
Chairman, Subcommittee on
SBA and SBIC Authority and
General Small Business Problems
2361 Rayburn Office Bldg.
Washington, DC 20515

Dear Mr. Smith:

You have invited this Company to supply a witness to appear and testify before your Subcommittee on General Small Business Problems. We have faithfully followed a policy over the years of full cooperation with governmental

inquiries concerning IBP or the beef industry and, indeed, even offered to cooperate with you—an offer that was rejected with disdain. We have done so because we believe that all we have done is in the best tradition of the American free enterprise system and because we support government's responsibility to see that enterprise remains free and that freedom is not abused. We could not have grown as we have without customer acceptance, a superior product and value, and adherence to the laws of this country.

Your investigation, and invitation to appear, present us with a unique situation. Until now we have found that most governmental agencies have had a sincere interest in our industry and a desire to obtain all pertinent facts and opinions in a fair, unbiased manner before leaping to legislative conclusions. However, we have followed the course of your hearings and have reached the tragic but inescapable conclusions that: (1) you do not appear to desire all of the relevant information and educated opinion on the subjects you claim to be investigating; (2) you have only superficial interest in fairness and only minimal regard for constitutional rights of due process or judicial procedures; and (3) you bear an obvious prejudice against this Company and have gone to some lengths to publicly defame us on numerous occasions.

Your attitude initially puzzled us, but gradually the motivations behind your investigation have become clear. Quite fankly, we are appalled by them.

We have long known of your close friendship with and political ties to Lex Hawkins, who is the lead attorney representing the so-called Meat Price Investigators

Association ("MPIA"), a small fringe group of farmer-feeders formed to pursue treble damage antitrust litigation against most of the principal supermarket chains and also against IBP and three other "new breed" beef packers who have successfully resisted unreasonable union demands that have crippled other packers and, by admissions before your own committee, made them non-competitive in their cost structure. We also know that Mr. Hawkins prepared your formal special counsel, Donald O'Brien, for your initial hearings and that your investigator, Nick Wultich, copied Hawkins' deceptive and unfair approach in his co-called "analysis" of the Yellow Sheet's reporters' work sheets that Mr. Hawkins had previously used in deposing Lester Norton, the National Provisioner's president, in the antitrust litigation. You also invited testimony containing derogatory innuendoes about IBP from James Cothern, who appeared under the guise of an impartial academic economist, without disclosing that he was in fact a paid consultant to Mr. Hawkins in the antitrust case.

You have also now used the fruit of Mr. Hawkins' unethical clandestine meetings with Hughes A. Bagley, a disgruntled former IBP officer who stole thousands of confidential IBP documents when he left IBP in July, 1975.* Mr. Hawkins arranged these meetings at a time when Bagley was a high-level executive of Spencer Foods, Inc., another defendant in the antitrust case, but without first obtaining the consent of or even notifying Spencer or its counsel—conduct which was unethical, as the federal Court of Appeals for the Eighth Circuit has found.

Although Mr. Hawkins had thus obtained copies of Bagley's IBP documents, he could not freely give them to you because two federal courts had issued protective or-

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* Included were such things as weekly profit and loss statements, monthly reports on production and sales, customer lists, monthly president's staff reports, budget materials, production reports on yields and other highly proprietary data—hardly Bagley's personal papers.

ders precluding the disclosure of those documents to persons not involved in the litigation between Hawkins and MPIA and IBP.

However, you did not let these court orders stop you. Following a suggestion by Mr. Hawkins' client (MPIA's Chairman), you first subpoenaed the documents from Hawkins, who then moved in the antitrust case for leave to comply notwithstanding the protective order. But Judge William Taylor in Dallas instead found your attempt to "run roughshod" over his order a violation of IBP's due process rights. Your appeal from that decision was thrown out by the court of appeals because you had never obtained the necessary authorization from the House of Representatives to conduct litigation in pursuit of the documents.

You then subpoenaed the documents from Bagley, who moved for an order from the court presiding over IBP's action against Bagley, Hawkins and others allowing him to turn over the documents without violating the Court protective order. The District Court erroneously granted Bagley's motion, but before IBP even learned of the decision and could start the appellate process which ultimately led to its reversal, your investigator seized the documents from Bagley's lawyer. You thereafter refused to submit to the jurisdiction of the court of appeals hearing the matter, and your counsel, Mr. Fitzgibbons, bragged that the documents were now in your "ballpark," where legal rules do not apply.

You have thus throughout your hearings followed the strategy charted by Mr. Hawkins, and we are forced to conclude that your chief goal is to be of assistance to your friend and political associate in his treble damage actions. We have considered the possibility that you have acted in good faith and that Mr. Hawkins has simply misled you. But we have had to reject that possibility because you

have obviously chosen only those witnesses bearing particular grudges against IBP or who fear new competition and are attempting to forestall IBP entry into their protected markets. This roster of witnesses in itself rules out a bona fide effort on your part to study the meat industry.

In addition, although your hearings were originally billed as exploratory of "impediments to meat marketing," you have studiously avoided the greatest impediment of all —namely, the illegal prohibition against handling prefabricated boxed beef imposed by the Amalgamated Meat Cutters & Butcher Workmen's Union on retailers in important metropolitan areas. We note that Mr. Hawkins' former

law firm has represented that Union for many years and that Mr. Hawkins personally has represented a high official of that Union. Similarly, your former special counsel who initiated these hearings represented union members or sympathizers who were convicted of dynamiting IBP property (or the homes and cars of non-striking workers) during a violent strike against IBP in 1969-1970. As a result of that strike, IBP was awarded a multi-million dollar federal court judgment against the Union for damages sustained by IBP.

Finally, we also believe that you are attempting to make political capital out of an anti-IBP crusade. There are undoubtedly some people in Iowa associated with the Amalgamated Meat Cutters Union and the Meat Price Investigators Associaiton represented by Mr. Hawkins who will be pleased by your attacks on us, and given IBP's importance to the State's economy and the controversies surrounding the Union's strikes, the local media understandably are willing to give you all the attention you seek.

Because of your plain prejudice against us and your unwillingness in the past to abide by due process and the

rule of law, we were initially inclined simply to reject your invitation and, when appropriate, tell our story in the courts or before congressional committees having jurisdiction over the meat industry where we would be fairly treated. But your attacks upon us and the distortions of the truth occurring in your hearings have reached such an extreme that we owe those persons who deal with us on a day-to-day basis and whose trust we have earned over the years a specific rebuttal of the accusations that have been made in your hearings and published by the press. Therefore, while we reject your invitation to appear at your hearings, we submit the following statement to show that our unwillingness to appear results not from an inability to refute the charges made against us, but instead from our firm conviction that we would not be provided a fair forum and would be used as simply another opportunity on your part to grab headlines by anti-IBP accusations. Accordingly, we ask that this letter be made part of the official proceedings of your Subcommittee.

We realize that our rebuttal will not have the least impact on you or on your continuing attacks on this Company, but we hope that the open-minded members of your Subcommittee, the media, the cattle and beef industry, and

the public who may read it will begin to question and not uncritically accept what you are saying.

Yellow Sheet

You began your meat indusry hearings in the fall of 1977 by focusing on your suspicions of "manipulation" of the Yellow Sheet reporting of beef prices. At that time, Mr. Hawkins had on file antitrust complaints against the supermarkets and packers, including IBP, also alleging manipulation of the Yellow Sheet.

Your hearings were anything but an objective examination of the Yellow Sheet and beef price reporting; instead

you were plainly an advocate for a particular viewpoint, called an overwhelming number of witnesses known to support that viewpoint, and ignored all contrary testimony and evidence. As indicated above, your strategy was identical to that of Mr. Hawkins, who in fact prepared your Subcommittee counsel for the hearings; Mr. Hawkins' retained economic expert James Cothern, was one of your main witnesses but failed to disclose his connection to Mr. Hawkins and thus his obvious motivation to support litigation positions taken by Mr. Hawkins; and your staff investigator used precisely the same misleading technique of analyzing the Yellow Sheet reporters' work papers that Mr. Hawkins used in deposing Mr. Lester Norton, President of the National Provisioner which publishes the Yellow Sheet.

Despite your efforts to skew the record against the Yellow Sheet, your hearings disclosed no evidence of manipulation of the Yellow Sheet's reports of beef prices. However, that did not prevent you from concluding in your Report that "there is a *possibility* of meat packers and others reporting sham sales to reporting services in order to manipulate the prices reported" and that "the free market system has deteriorated and is close to being eliminated entirely." (Underscoring supplied.)

Other more responsible bodies without a particular axe to grind have completely rejected your conclusion. The USDA has made its own in-depth study of beef price reporting and went well beyond the faulty methods used in your investigation by examining packers' sales documents to determine whether the Yellow Sheet accurately reflected

actual sales prices. It concluded that the Yellow Sheet did fairly report the market and was not manipulated. That conclusion has recently been fully endorsed by the 300,000 member National Cattlemen's Association, which specifical-

ly rejected your views. Likewise, the Antitrust Division of the Department of Justice investigated the Yellow Sheet's price reporting and found no evidence to support accusations of conspiratorial manipulation.

As we told the USDA's Beef Task Force, which also rejected your views, we are by no means irrevocably committed to the present systems of beef price reporting, although we do believe that they have performed a valuable service to the entire industry. We will gladly participate in any objective efforts to devise new and better methods. However, we deplore your unjustified attack on the integrity of the Yellow Sheet and those who report to it and your willingness to allow your Subcommittee to be used for private litigation purposes.

West Coast Packers

Your first efforts to attack IBP directly began with your full endorsement of the testimony of Edwin R. O'Neill, a leader of the Western States Meat Packers Association, who complained that efforts by IBP to enter the West Coast beef market would result in IBP monopoly power which would drive many local packers out of business. He also claimed that large boxed beef companies including IBP benefited from "substandard" wage rates paid their employees.* You readily accepted the truth of these accusations without apparent concern that numerous members of the Western States Meat Packers Association have recently been convicted in federal court of price fixing and are clearly trying to protect themselves from the rigors of free price competition with IBP. Other congressional members of your Subcommittee, however, plainly knew the score, although their comments appear to have been ignored by the

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* In fact, a recent wage survey by the Pacific Coast Meat Association showed that the IBP plants surveyed averaged 60c/hour more than the non-IBP plants surveyed--and your majority staff was well aware of that fact.

press. For example, Congressman Marriott commented as follows after listening to O'Neill's testimony:

> "I am in favor of the interests of small businesses, but some small businesses grow to be big because they are efficient, because they capture a market, because they are able to serve a need.
>
> "I am just wondering if we have this kind of situation and whether Iowa Beef is really as big a culprit as we are saying they are."

* * * *

> "I am trying to take your position, but I am having a difficult time getting any meaningful facts to indicate that we have a problem other than one company in the business has out-maneuvered the rest of you and are making some money and selling beef at a lower price, and then we are all scrapping around worrying about how to contain them."
>
> "I am not sure containing them is the way the free enterprise system ought to work."

Given these concerns, Congressman Marriott asked O'Neill point-blank whether he had evidence that large packers were violating the antitrust laws, and O'Neill, despite the accusations of his prepared statement, conceded:

> "I have no idea. It is something, I do not think, that one sitting where I am sitting and being rather removed could see these things. But I think it should be looked into, and there is no way that I could make a conclusion on that."

Colorado Packers

Your next witnesses—representatives of the Colorado Meat Dealers Association—made even more sensational

charges against IBP and submitted supposed statistical evidence that an IBP plant in their area would drive smaller packers there out of business by depriving them of the supply of cattle they needed to continue operations. They specifically referred to IBP's purported "national monop-

oly power," "predatory" pricing, and "improper means" of gaining market "dominance." However, their economists' conclusions upon which these Colorado packers based their dire predictions of the consequences of an IBP plant in Colorado are entirely specious.

The Colorado economists' basic premise is that an IBP plant in their State with a slaughter capacity of 1.2 million head per year would take all the cattle needed by present Colorado packers who are not integrated with cattle feeding (as are some Colorado packers) and thus do not have "captive" cattle supplies. To reach this conclusion, they grossly inflated the number of steers and heifers slaughtered by these non-integrated packers, ignored the significant increase in the number of steers and heifers currently on feed in Colorado feedlots and the unused capacity of existing feedlot facilities, and assumed that IBP would begin maximum production in Colorado immediately. In fact, IBP would gradually phase in its production, which in any event would not even commence for another two years, a period in which feeders would surely adjust to the future increased demand for cattle. The economists thus refused to consider the obvious stimulus to cattle feeding from a new large plant in the region.

These various economic fallacies completely undermine the Colorado packers' assertions that they will be unable to

co-exist with an IBP plant in Colorado.* Quite to the contrary, since the area has had more cattle than slaughter capacity there will be sufficient cattle supplies for all who wish to compete for them. Moreover, the cattle feeders in Colorado and western Kansas would undoubtedly prosper, which is why they, as well as the Colorado legislature and Governor and the two Kansas senators and Representative Sebelius have all ardently supported IBP's proposed new plant. Obviously, like the West Coast packers, these Colorado packers would prefer their present cozy relationship and dread spirited and open competition from IBP, as in-

dicated by the following Freudian slip by their spokesman (Spivak) to Congressman Smith:

> "We are not afraid of competition, let us be clear about that. We are afraid of competition when it begins to affect our area."

Northwest Packers

You continued your attempt to expose the supposed IBP threat to smaller packers by entry into new regional markets by "investigating" the Pacific Northwest—not through the testimony of other packers in that region, but rather through a cursory telephone survey of the packers by John Helmuth, your staff economist. The respondents to the survey questions were unidentified, and Mr. Helmuth admitted that "[s]ince this was a telephone enumeration, the questions were necessarily general, and detailed re-

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* The Colorado Meat Dealers also failed to offer any hard evidence corroborating their broad assertion that they are as efficient as IBP. They also claimed that IBP's purchases of carcasses from other packers equal 15% of Federally Inspected Slaughter. In fact, we have never purchased from other packers more than 1.5% of the annual FI Slaughter.

sponses could not be garnered within reasonable time restraints."

The answers to Helmuth's telephone questions were as useless as his survey technique: 35 of the 43 packers described the "current economic health of the beef packing industry in [their] area" as "unhealthy;" but only 30 reported that their 1979 "margins" were worse than 1978's. The term "margins" was not defined by Helmuth and it was left to the individual packer to interpret; but apparently Helmuth thought it meant percentage of profit per head sold. If so, the same dollar per head profit would enable a packer anxious to complain about IBP's entry into the market (and purposely not pressed by Helmuth for specifics) to report "worse" margins in 1979 simply because the price of beef had risen dramatically between 1978 and the Spring of 1979. Also, since 1978 was apparently a record profit year for many Northwest packers, it would not be at all surprising (or significant) if early 1979 margins were not as good. Significantly, your own staff report indicates that the primary reasons for lower margins are tight cattle supplies because of the low phase of the cattle cycle (a nationwide phenomenon), consumer resistance, and new competition from IBP's boxed beef (certainly a desirable result in an area previously characterized by a shortage of locally produced beef and, according to the Justice Department, price stabilizing arrangements among the local packers).

Even more revealing than the answers to Helmuth's vague "economic health" and "margins" questions are the answers to his questions concerning "any problems you may be having" procuring cattle or selling product. Despite the general cattle shortage experienced by all packers (including IBP) only 9 of the 43 surveyed packers reported "severe problems" in cattle procurement and only 10 reported "severe problems" in selling product. Moreover, your own staff report indicates that it is the large packers

who are the biggest complainers and they are the ones who have had their own totally-captive cattle supplies for years and have been indicted (or named as co-conspirators) for price-fixing. The moderately sized and smaller packers reported that they are able to make a profit for various reasons, which shows that they are adapting to the new competitive situation in the Northwest. Their biggest specific complaint seemed to be "harassment by USDA because of the bonding requirements they face." You may not know it, but while generally supporting the concept of packer bonding (e.g., IBP voluntarily bonded itself years before the law required it), IBP warned USDA against excessive bonding requirements precisely because we felt they would unfairly burden smaller packers and endanger the structure of the industry, which necessarily includes smaller packers who can perform functions which IBP and the larger packers cannot perform as well.

The bottom line question Helmuth asked was whether the surveyed packers expected to be out of the cattle slaughtering business within the next year, and only 2 said "yes" —not a surprising number considering that your own report shows an average of more than 3 packers a year went out of business in the ten years *before* IBP ever came to the Northwest.

The significance of one general comment made by the surveyed packers was completely lost on you and Mr. Helmuth: Several packers reported that they could purchase carcasses from other packers as far away as Texas cheaper than they could slaughter them themselves. Since the difference in the live cattle market in the 2 areas cannot account for this phenomenon, this is an admission that inefficiency and excessive kill costs make those packers noncompetitive with Texas packers by more than the freight from Texas. And yet you and your staff seem willing to ignore entirely the subject of comparative packer costs and efficiencies. Indeed, you repeatedly have expressed concern for the welfare of packers who are every bit as efficient as IBP—and yet you have made no effort whatsoever to force complaining packers to produce evidence that they are in fact operating efficiently and deserve your sympathy.

Despite the patently unscientific and hurried nature of the Helmuth survey and the absence of any verifying evidence, you were quite willing to conclude that the situation in the Northwest resulting from IBP's joint venture with several feeders was "unhealthy" and "anticompetitive" even though an extensive trial of those very issues in federal court in Boise and the Department of Agriculture itself reached the completely opposite conclusion.

As you know, the USDA filed an administrative complaint and a preliminary injunction application to preclude the members of the North West Feeders cooperative from marketing their cattle through IBP under a 50-50 profit-sharing arrangement—exactly the kind of arrangement which the USDA's Farmer Cooperative Service had been urging cattlemen to pursue as a way to increase their share of the profit from the sale of their livestock. As you also know, in June, 1978, District Judge Fred Taylor in Boise threw the preliminary injunction request out of court, saying that the USDA had been poorly advised to bring the case because the joint venture made good business sense and the new IBP plants (which it made possible) would be an asset to the area. Subsequently, in January, 1979, the USDA voluntarily dismissed the administrative complaint as not being in the "public interest."

Furthermore, Secretary of Agriculture Bergland opened your current round of hearings on May 1, 1979 by telling you that after the USDA's complaint was filed:

> "economic conditions in the cattle feeding and packing industry improved appreciably. The number of cattle on feed increased greatly; packers competing with Columbia Foods [IBP's subsidiary] operated profitably, many increasing their slaughter and at least one showing record profits; and feedlot and cow-calf operators experienced improved markets.
>
> "The anticipated adverse economic effects of the joint venture did not occur."

You were also specifically assured at that opening hearing by Charles Jennings, Deputy Administrator of the Agricultural Marketing Service for Packers and Stockyards, that the USDA had sufficient resources to monitor

the joint ventures and would know in a short period of time of any anti-competitive practices. The USDA has *not* found any such practices in the Northwest and there are none. Rather, there is just good old-fashioned competition by the first successful new entrant in the Northwest packing industry in many years.

Thus, your initial efforts were devoted entirely to bringing forth and endorsing the views of particular packers who oppose new competition and want to insulate their regions from the stimulus provided by energetic, innovative packers based elsewhere. It is just such insulation which allows anticompetitive practices and arrangements to breed and thrive. Despite the extensive and uncritical coverage the press gave to the complaints of these special, vested interests, we trust that every reasonable, fair-minded person will immediately see them for what they really are: Last ditch attempts by entrenched packers to avoid exposing their inefficiencies to the acid test of open competition.

The Williams Report

Your next step was to add the superficial veneer of academic respectability to your accusations by presenting with much ballyhoo a study by Prof. Willard F. Williams, a paid consultant to your Subcommittee, entitled "The Changing Structure of the Beef Packing Industry." Williams himself called his report "sort of a rush job." You, however, labeled this report a "landmark" and its results "alarming," although it is hardly that. What is alarming is the manner in which you distorted the Williams report in your press release to obtain sensational headlines.

The week before the Williams report was to be formally submitted to your Subcommittee, you leaked to the press a copy stamped "Tentative Final Draft *Not For Release or Publication,* "accompanied by a press release based upon the tentative draft, to be published on the day the report was formally submitted. Despite the tentative draft's significant differences from the final version Prof. Williams actually gave you, the press accounts of his report were based on the tentative draft and your press release and you never informed the media of the discrepancies.

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The tentative draft and your press release referred directly to IBP as "predatory," stated that IBP may have been indirectly responsible for American Beef's bankruptcy, and claimed that "structural chaos" was occurring in the Northwest because of IBP's entry. *None of these advance press release allegations appeared in the final version of Prof. Williams' report.* Indeed, in his oral testimony before your Subcommittee, Prof. Williams specifically conceded that he knew of no evidence of predatory conduct by IBP and thought American Beef probably failed because it over-extended itself in attempting to keep up with its competitors. In his final report, the reference to "structural chaos" in the Northwest was diluted to a statement of the obvious—that there were "noticeable structural rearrangements" taking place. The public was never told of Williams' final conclusions, and was, therefore, left only with your characterizations of his preliminary draft.

Except for some obvious factual errors and faulty economic analysis,* the Williams report itself is nothing

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* Both Prof. Williams and you, for instance, misunderstand the 1970 IBP consent decree. You both stress that it prevented any expansion by IBP in the 4-state area through 1980. In fact, it merely blocked IBP acquisition of existing plants; we have been completely free to build new plants in the area.

more than an innocuous compilation of statistics that show what everyone in the beef industry already knows—that the structure and location of the cattle feeding industry has changed and that the most dynamic packers have changed with it by building larger, more efficient plants where the cattle are located in order to avoid wasteful transportation and shrink. It is a story which has been repeated in American business a thousand times over when we saw the appearance of the automobile, the electronic computer, hybrid seeds, etc. While Prof. Williams apparently has a nostalgic preference for plants that kill only 100,000-150,000 head per year, the USDA has recently warned farmer cooperatives interested in entering the meat packing business that today's technology and economics dictate an optimum kill capacity of at least 375,000 head—the kind of plant that IBP and its modern competitors have been building.

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Despite your conclusion that the results of the Williams Report are "alarming," an objective reader (accepting its statistical projections of the number of firms and plants that will be in existence in 1995, although the assumptions upon which they are based are inadequately explained and justified) can only be *reassured* by its indication of the degree of competition that will persist throughout the remainder of this century. Prof. Williams predicts that there will be 572 packers in 1995 compared to 638 in 1977, and those packers will have 659 slaughtering plants compared to 711 in 1977. Moreover, most of the changes would occur among the smallest packers killing 0-9,999 head a year (less than 200 head per week), and competition among the largest firms will significantly *increase:* Prof. Williams projects 41 firms killing more than 200,000 head a year in 1995, whereas there were only 25 such firms in 1977. Indeed, the number of firms killing more than 1 million head annually—plainly those that would compete most effectively with IBP—will nearly *triple* from 5 to 13.

The only thing smacking of sensationalism in the final version of the Williams Report was its construction of a scenario about IBP potentially forcing cattle prices up and boxed beef prices down to apply a cost-price margin squeeze to its competitors. However, Prof. Williams took great pains in both the report itself and in his later oral testimony to describe the scenario as a completely hypothetical situation which in fact had *not* occurred.*

Moreover, while Prof. Williams purports to be knowledgeable about the cattle industry, he further admitted that his hypothetical was borrowed from a study by economist Peter Max of National Economic Research Associates ("NERA"). Although Mr. Max had no previous experience in the cattle or beef industries, the USDA spent

$17,500 of the taxpayers' money to have him do a two-week study in September, 1977 to see if there was a viable economic basis for filing a complaint against IBP either because of its fast growth or because of its joint venture with the North West Feeders' cooperative. Only after concluding that (1) "little, if any, of the data suggests a monopoly position for IBP and much of the data does not point to undue concentration" in the beef industry and (2) that "there is little current indication of known conduct by IBP which inherently is anticompetitive," did Mr. Max invent his price-squeeze hypothetical.

The USDA then hired another outside consultant, Mr. Mund, to provide a critical appraisal of the NERA report and he, apparently, convinced the USDA that the Max hypothetical was too far-fetched to pursue. Now we find the same price-squeeze hypothetical regurgitated by Wil-

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* Since this hypothetical scenario was not in the tentative draft of the report, someone obviously made the last-minute decision that draft references on predatory conduct by IBP were unsupportable and then strove to get as much mileage as possible out of hypothetical conduct.

liams, but only after he expressly disavows having made any study of the conduct of IBP or other beef packers and therefore takes no personal responsibility for the hypothetical, and after admitting that he personally believes that IBP and the beef packing industry in general are efficient and highly competitive.

Without your leaking of the rejected tentative draft of the report and your press release based upon it, the Williams Report would hardly have triggered the extensive press coverage you did obtain with your unsupportable—and therefore defamatory—statements about IBP predatory conduct. The Williams testimony is therefore another example of your predisposition toward castigating IBP, regardless of the fact supplied even by your own paid witnesses.

Hughes Bagley

You subpoenaed Bagley, who had been IBP's Vice-President for Retail Sales, from 1971 until terminated in 1975, and is now an officer of a competitor, Dubuque Packing Co. When he left IBP, he stole 7 boxes of IBP documents, many of a confidential business and legal nature. Later he obtained additional confidential IBP documents generated after his departure from two other former IBP employees. Despite the fact that two courts have ruled that these confidential IBP documents are entitled to protection from public disclosure, you felt free to release

many of them at your hearings without affording IBP any opportunity to assert its constitutional right to the privacy of its business and legal affairs.

The thrust of Bagley's testimony was that he believed he should stand up and be counted because he was concerned that IBP had become "overly zealous in its attempts to control and monopolize the packing industry."

(At one point, you goaded Bagley into the ridiculous suggestion that there was also some danger that IBP would take over the entire U.S. food retail industry.) Ambitions to lessen the influence of the old line packers and bring IBP into a dominant position in the packing industry, as well as to dilute the historical dominant bargaining position of the large supermarket chains, are attributed to IBP's former Co-Chairman, C. J. Holman, who died in February, 1977, and Bagley does not purport to have any knowledge of IBP's present management's goals.

To support his accusation that IBP was out to take over the packing industry, Bagley cites several things he thought may have been illegal, although he repeatedly disclaims having any legal knowledge and denies that he is accusing IBP of anything illegal.

First, Bagley is concerned that because IBP has succeeded in becoming the most efficient, low-cost producer in the industry, it can pay its suppliers more for their cattle and thereby "deprive" competing packers of their raw material. While IBP does try to pass some of its cost saving backs to the cattle feeders who are, after all, the life blood of the industry, there is no way that IBP has or could corner the live cattle supply. For example, IBP's fiscal 1978 slaughter (its highest ever) was 4,351,512 head, which was only 11% of the nation's commercial slaughter of 39,552,100 head.

Next, Bagley is concerned that IBP's purchase from competitors of carcasses for boxed beef fabrication might make them captive suppliers and enhance IBP's market position. However, he conceded under questioning by Congressman Richmond that there were valid business rea-

sons for purchasing carcasses and that his own company both buys from and sells carcasses to IBP. In fact, IBP has purchased carcasses only when necessary because

not all of its own slaughter meets IBP's processing specifications, which Bagley praised, or when appropriate to achieve purchasing or transportation economies. For example, in fiscal 1978, IBP purchased 459,895 carcasses which comprised only 13% of its total boxed beef carcass equivalent sales and 1% of commercial slaughter.* As for the captive supplier idea, we know of no complaint to that effect from anyone who has sold carcasses to IBP (including Bagley's company) and believe that suppliers are pleased to have a reliable market outlet for a portion of their production, with prompt payment and minimum credit risk. Indeed, if you had bothered to ask them, you would have found that many smaller packers without the capital or facilities for large scale boxed beef production welcome the chance to fulfill a useful economic function in the modern beef industry which, as even your hand-picked witnesses again-and-again testified, is inevitably drawn to the economies, efficiencies and sanitation of boxed beef.

Finally, Bagley's scenario calls for IBP to move into "portion control" beef and then into the pork business. Portion control involves a packer breaking down the carcass into even smaller units, such as individual steaks and roasts, than the industry has yet developed. Indeed IBP believes it is a logical extension of the boxed beef technology to which IBP is committed—but it is perhaps 10 years away. And IBP's pork facilities consist of one plant, acquired in 1976, which kills (exclusively under contract with Armour) only 1.4% of the nation's pork slaughter.

In addition to his "revelation" of IBP's game plan to dominate the beef packing, retailing, and pork industries, Bagley described certain incidents which he thought would be embarrassing to IBP. These incidents are ancient history and, in any event, are no better than scandal sheet gossip.

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* At one point Bagley indicated that IBP purchased 15,000 carcasses per week, which would be 780,000 per year. This has never happened.

Processing Fee and Yield

Bagley implied, (but would not state unequivocally, under questioning by Congressmen Richmond and Evans) that IBP had engaged simultaneously in the impossible feat of both predatory pricing and customer gouging. He claims this is done by quoting a below-cost processing fee but at the same time understating the primal yield in its Cattle-Pak pricing formula. ("Cattle-Pak" is IBP's trademark for the four primal cuts—loins, ribs, rounds and chucks—sold in boxes as a unit with the price determined by adding the quoted market price of a carcass plus a fee for selection and processing and minus a credit for unwanted fat, bone, and other "thin meats" retained by IBP.) Because the formula and the role of the primal yield are complex, Bagley was able to conceal the truth in confusion, and it was evident from your own comments and questions that you did not understand the issue. We shall try to elucidate.

The Cattle-Pak pricing formula is necessarily constructed around assumptions and averages because all cattle—like all people—are different. For example, it is assumed that the average carcass will weigh 650 lbs. and that it will yield a certain percentage of salable primal cuts versus the total carcass. The primal yield percentage used in constructing the formula price per pound of actual primal weight shipped may or may not be attained in practice due to cattle and production variations. In effect, IBP guarantees its customers a firm price/cwt. on its Cattle-Pak cattle, the price guarantee necessarily being based upon an assumed, stated yield. The average actual yield attained in production depends on 2 factors: the average characteristics of the carcasses (and, therefore, the cattle) procured for processing and the efficiencies achieved in production. If the average actual yield over time should exceed the assumed yield used in the formula,

IBP's anticipated gross margin available to cover processing costs and profit will increase; but if the actual yield is less than the assumed yield, the gross margin will shrink —and IBP takes that risk. In either case, the customer is no worse off because he knows what the stated yield is in the formula, and either buys IBP Cattle-Pak or buys from someone else according to whether he is satisfied or dissatisfied with the price/cwt. which results from the stated yield applied to the cost of the carcass plus the selection and processing fees. This is the free market at work.

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As IBP has been able to improve its production techniques, and as leaner, better-yielding cattle have been fed by the nation's cattle feeders (stimulated in part by IBP's demand for cattle suitable for its boxing standards), IBP has been able to gradually raise its stated yields in the Cattle-Pak formula while keeping a reasonable processing fee in the face of rising labor and packaging costs:

Regular C/P

Date	Primal Yield	Packaging & Processing Fee (Per Head)
1970	61.1%	$30.70
November 1971	61.1	31.50
December 1972	61.1	32.58
September 1973	62.5	32.58
June 1974	64.5	38.18
February 1976	64.5	34.84
July 1978	65.0	34.84

If IBP's state yields were somehow "fudged" (a term coined by Bagley) to disadvantage customers, it seems very strange that, when Bagley joined Spencer Foods, Inc., in

the fall of 1975 as executive Vice President in charge of boxed beef production, he there installed boxed beef programs and stated yields that were substantially copies of IBP's programs and yields. Likewise, at Bagley's present employer, Dubuque Packing Company, there are startling similarities between IBP's "Cattle-Pak" and Dubuque's "Dupac" programs, even extending to sales literature that tracks IBP's almost word for word, a processing fee identical to IBP's ($34.84), and a yield identical to IBP's (65%). (See, e.g., the attached sample Dubuque form entitled "DUPAC CATTLE PRICING REGULAR CATTLE.") Indeed, Dubuque became so cavalier about literally copying IBP's formula pricing forms that it has forgotten to white-out or otherwise change such terms as "IBP Trim" and IBP's registered trademark "Cattle-Pak" (see the other attached sample Dubuque form), and as a result IBP recently had to caution Dubuque about trademark infringement.

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Because of the interrelationship between the yield and the processing fee in the Cattle-Pak formula, it was possible in 1976 to reduce the fee from $38.18 per head (which Bagley himself had advocated in June 1974) to $34.84,* even though the estimated cost of fabrication was $38.01.* Indeed, this was necessary because the formula

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* In this context it should be noted that the selection fee of $.75/cwt., or $4.88 on a 650 lbs. carcass, when added to the $34.84 processing fee, by itself produces total revenue of $39.72, or $1.72, or $1.71 more than the estimated cost of fabrication. This alone is dispositive of any allegations of sales of Cattle-Pak cattle below cost.

Bagley had persuaded IBP to adopt in 1974 raised the cost of Cattle-Pak and constructed a price umbrella for competitors which, over time, stifled further growth of Cattle-Pak sales. When, in late 1975, IBP's Formula Pricing Committee tried to analyze why Cattle-Pak sales had declined, they found that (See your Exhibit 39a)—

> " * * * customers buying straight carcasses [formula Cattle-Pak] were being penalized and customers buying [negotiated] pieces were being rewarded. Our current formula acts as a disincentive to buying straight carcasses. Most of our customers have figured this out and can often put the pieces together at less than the cost of straight carcasses * * *."

Thus, the Fabruary, 1976 reduction in fee was necessary to restore customer confidence in the economics of Cattle-Pak, but was not below cost because, as Exhibit 39a also indicates, "a portion of any [anticipated] yield advantage [was used] to reduce the formula [processing fee]."

Bagley's self-contradictory suggestion that the fee was *apparently* below cost and predatory but the yield was understated, and that, therefore, the price was overstated, is of course absurd: the Cattle-Pak price cannot be simultaneously too high and too low because the yield and fee must be considered together as part of an integral formula. That produces the bottom line price which customers evaluate.

In fact, the 1976 formula fee reduction was calculated to produce an average profit of $5 per head for IBP's processing and packaging services—a fact which we are proud to have the world know.

Bagley also emphasized Perry Haines' memo recommending that the fee reduction be significant enough to build Cattle-Pak volume by giving "our customer the lowest possible price for whole cattle." This necessarily meant taking business from competitors and, as his memo expressly states, this was not to be done by "predatory" or below-cost pricing, but *by pricing to IBP's own costs,* rather than to those of its inefficient competitors. Haines said: "If we price to our cost, the high cost marginal producer by definition will be forced to step aside." (He was, of course, referring only to the few competitors who sold a version of Cattle-Pak [not boxed beef pieces], which was the only product involved and constituted only 20% of IBP's boxed beef sales and far less of those competitors' boxed beef sales.) Bagley, too, recognized in his testimony that it was unwise for IBP to construct a formula which held an "umbrella" over higher cost competitiors and that is exactly what Haines was trying to avoid.

Thus, once the history and relationship of the Cattle-Pak formula fee and yield are understood, IBP's constant attempts to keep the two in balance, and the fee reduction in 1976 to eliminate an imbalance created by Bagley's 1974 formula, make perfect competitive sense.

Waldbaum Cattle-Pak Formula Price

Although Bagley admitted that he did not know the origins or rationale of IBP's Cattle-Pak formula pricing to the Waldbaum chain, he felt free to suggest that it was

illegal, below-cost pricing used by IBP as a tool to break into the New York market. The facts are otherwise.

1970 was a watershed year for IBP and boxed beef. IBP was just emerging from a bitter 9-month strike by the Amalgamated Meat Cutters at its principal processing plant in Dakota City, Nebraska. IBP's processing division was losing money and desperately needed volume to achieve cost efficiencies that would enable boxed beef to compete with carcass ("swinging") beef. The New York

market had the greatest volume potential, but was effectively closed to IBP because of union resistance to prefabricated beef and retailer inertia coupled with fear of Union reprisals.

Bagley attempts to minimize the impact of Union opposition because he had been able to purchase some boxed beef when he was meat director for the Bohack chain from 1967 until he was fired in 1969. What Bagley did not tell you is that the boxed beef he was buying then was fabricated by journeymen butchers employed by *Chicago* and *New York* "breakers"—*not* by packers (like IBP) at point-of-slaughter using assembly-line processing techniques and less skilled, lower cost labor. (Although the Amalgamated represents both urban butchers and packinghouse workers, the bulk of its dues comes from the retail butchers and it therefore has always resolved its own internal conflict of interest in favor of its urban members by opposing in every conceivable way beef prefabricated at the packinghouse—even by its own members. The Union has also struck IBP plants—or otherwise been involved in labor disputes with IBP—9 times in the past 10 years, trying to force IBP to pay unncessarily higher skilled butcher rates for assembly-line work.

In any event, in 1970 IBP was unable to get any N.Y. chain to adopt its boxed beef program consisting of stand-

ing weekly orders of Cattle-Pak, supplemented by extra cuts when needed. This program provides a steady base load to support production efficiencies.

Finally, the Waldbaum chain was persuaded to work with IBP to develop a special fabrication suitable for the N.Y. market and to switch all of its stores away from carcass beef and onto the Cattle-Pak boxed beef program. This different, more boneless fabrication for Waldbaum (which ultimately became Eastern-style Cattle-Pak—not the other way around, as Bagley tells it) required a new formula, which was negotiated between C. J. Holman and Waldbaum's head meat man, Aaron Freedman, both now deceased. We do not know all of the details of their agreement, but we do know that later it was Waldbaum's position that Holman promised, in return for Waldbaum's commitment to pioneer the use of the Cattle-Pak program on the East Coast and endorse it publicly if it worked, that the service fees would *not* increase but would, if any-

thing, decrease over time as production efficiencies were achieved. We also know that the Waldbaum fabrication *and* pricing formula was offered to—but initially *rejected by*—other N.Y. chains, specifically including Bohack.

As time passed, Waldbaum became a showcase example for the success of IBP's boxed beef program and other chains did accept Cattle-Pak. However, labor and packaging cost increases more than offset production efficiencies, forcing periodic increases in the service fees which Waldbaum did not pay because of Holman's initial commitment.

After Bagley joined IBP and discovered the discrepancy, he sought help from IBP's General Counsel William L. Heubaum early in 1973. He sought help not (as he says now) simply because he was concerned about the legality of the arrangement, but primarily because he wanted to

improve the profit performance of the processing division by raising the Waldbaum price to the same level as other buyers. Heubaum accomodated Bagley by generating legal memos which warned of the consequences of violating the Robinson-Patman Act and were to be used to persuade Waldbaum to accept the current Eastern Cattle-Pak pricing formula. (The formula applied *only* to Cattle-Pak; it did not apply to Waldbaum's negotiated beef purchases, which, as Bagley admitted, accounted for more than half of its volume.)

Bagley's efforts to raise the Waldbaum formula were not confined to working with counsel. In April, 1974 (while he was an employee of IBP) he leaked confidential IBP documents which had been generated by accounting personnel in the summer of 1973 (to demonstrate the economic impact of the Waldbaum formula on IBP) to an informant who then sold the documents to Bohack's management for $6,000. Bohack's president threatened suit against IBP and exposure of the documents unless IBP paid money to bolster its faltering balance sheet. C. J. Holman refused, claiming that there was nothing unlawful about the Waldbaum arrangement, and told Bohack to do whatever it felt it had to do. After seeking the advice of prominent N.Y. antitrust counsel, Bohack's president apologized and the matter was dropped until three years later when Bohack, as a Chapter XI debtor-in-possession, switched from the grocery business to the litigation business, suing two of its former suppliers (IBP and Borden), certain directors, and Gulf and Western for various alleged wrongs. IBP was sued notwithstanding that it had lost

$212,000 as a result of Bohack's Chapter XI proceedings and, alone, had been willing to extend beef credit to enable Bohack to continue operating its stores after the Chapter XI petition was filed in July, 1974. Bohack's suit against IBP remains pending, and IBP expects to be able to prove

that the Waldbaum arrangement was completely justified by the circumstances, was pro-competitive because it opened the New York market to boxed beef for *all* competitive packers, did not violate the technical provisions of the Robinson-Patman Act, and certainly did not cause Bohack's (or anybody else's) problems.

Your attempt to suggest that IBP's special pricing formula on *one* minor product in the New York market (Cattle-Pak) to *one* chain from 1971 to June, 1974 (when it was in fact terminated) was responsible for the current problems of such retail chains as A & P and Food Fair further demonstrates how absurd it is to resurrect the Waldbaum pricing question.

Quantity Discounts

Bagley's version of IBP's quantity discount program is absolutely false, and, we believe, constitutes perjury for which he should be cited. Moreover, the facts were available to you from the IBP documents which you seized—and yet you allowed Bagley to suggest that IBP had constructed and is still perpetuating an unlawful quantity discount program. The facts are as follows (citations are to the IBP documents which you introduced as Committee exhibits):

In mid-June, 1972, Bagley offered a quantity discount program on Cattle-Pak (only) to several retailers.* (Exs. 12 & 13.) The discount was progressive, based on weekly volume—ranging from 50¢/cwt. for a minimum purchase of 500 head to $1/cwt. for 1,000 head or more. This program had been devised by Bagley himself and had *not* been submitted to IBP's legal department for review.

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* Bagley offered this program to Safeway on June 19, 1972—not in 1971, as he testified. Safeway did not adopt the Cattle-Pak program at that time because it was already centrally-processing its own carcasses; not because of a concern over the formula yield, as Bagley claims.

On June 21, 1972 Bagley wrote a memo instructing all processing sales people to offer the same program to "all accounts"—hardly consistent with Bagley's testimony that it was offered only to selected accounts. (Ex. 14.)

On July 11, 1972, Bagley's boss, Stanley Feldman, wrote Bagley a memo criticizing his description of the program because, for example, it did not apply to smaller accounts. (Ex. 15.) Thus, it was Feldman, not Bagley, who worried about the availability of the program to the smaller customers.

On July 28, 1972, Bagley wrote IBP's former General Counsel, Gus Nymann, who had resigned (and therefore the memo came to Mr. Heubaum's attention) asking for legal help in answering the questions Feldman had posed to Bagley. Again, it was not Bagley, but Feldman, whose concerns were being expressed. Moreover, although Bagley's memo said "We *anticipate* offering the following discounts to customers" (underscoring supplied), the fact was that he had already done so. (Ex. 16.)

The matter was taken seriously and a large meeting of IBP executives (including C. J. Holman) was held on July 31, 1972 to discuss Bagley's request for advice. It was decided that the minimum weekly purchase requirement should be lowered from 500 head to 250 head and that (Ex. 17.)—

> "The availability of the discounts will be communicated to all customers having the potential of purchasing the quantities specified."

So far as we know, that was in fact done (except it was not offered to Waldbaum because it had its own contractual arrangement). If not, it was Bagley's fault because he was in charge of the program.

At the July 31 meeting, newly installed General Counsel Heubaum was directed to determine whether the discount program had to be offered to IBP's distributors (who had separate contractual arrangements) as well as retailers. Heubaum sought the help of outside antitrust counsel who advised that the retailer discount did not have to be offered to distributors, but in the process cautioned Heubaum that since Bagley had predicated his retailer discount program on volume production cost savings being passed on to the customer, it was important to document those savings meticulously in order to satisfy the

evidentiary requirements imposed by Robinson-Patman interpretations of the FTC and the court.

Beginning in August, 1972, IBP sales, production, and accounting people undertook to identify and quantify those areas of cost savings believed to be inherent in the volume purchases involved in the discount program. These were not simply efforts to build a file, as Bagley suggests; they were extensive, ongoing, bona fide efforts to document cost savings. You selectively chose to disclose certain confidential documents on this subject (Exs. 18-25.), but omitted others in your possession which show IBP's strenuous attempt to comply with what is believed to be the law, including review by outside antitrust counsel of the economic justification materials being developed by IBP people.

On November 6, 1972, outside antitrust counsel advised Heubaum on their analysis of the cost justification materials received to date. Counsel concluded that while some areas of cost savings looked promising as a basis for cost justification, more work had to be done to analyze and document each point. We wondered at first why you chose not to place this attroneys' letter in the public record, given

your complete disdain for the integrity of other IBP privileged documents. But, on reflection, your reasons are clear: the memo not only demonstrates IBP's efforts to secure proper legal guidance, but also contains handwritten notes by Bagley *disagreeing* with counsel's conclusions that in some areas there was no cost justification potential. Indeed, Bagley himself always (until last week) expressed the belief that the discount program he had devised was cost-justified.

Heubaum forwarded outside counsel's letter to IBP executives on November 9, 1972, set up a meeting to discuss it, and said: "We should be prepared to discuss the questions posed in this letter." (Ex. 26.) IBP's people took outside counsel's advive to heart and continued to develop cost justification materials during the winter of 1972-1973.

On April 2, 1973, in a memo you also chose to omit, outside counsel reviewed in detail the cost justification materials which had been gathered to date and advised that still more work needed to be done, including a "detailed cost accounting study of IBP's operations"—probably by outside cost accountants. This, of course, was a massive and expensive undertaking that would have taken months.

Congressman Neal Smith
August 1, 1979
Page Twenty-Seven

On April 27, 1973, Heubaum relayed counsel's advice to IBP executives and recommended a long range cost accounting study, but, pending that, termination of the quantity discount program for Cattle-Pak. (Ex. 27.)

The program was suspended during the price freeze of August-September, 1973, and was in fact terminated on September 12, 1973, when it was feasible to do so coincidently with a change in the Cattle-Pak formula yield recommended by Bagley. This is clearly shown in the documents

you and Bagley had available and there is no excuse for Bagley's waffling testimony that he was not sure how long the program continued or for his suggestion that it was still in effect in 1974 and 1975. (See Exs. 30-32.) Bagley was intimately involved in the termination of the program and his attempt to suggest that it was not then terminated is clear perjury.

Bagley again perjured himself by suggesting that the 143 rebate checks distributed by IBP's Lou Havrilla to customers in June, 1975 (Ex. 33.) had anything to do with the previous program or were somehow unlawful. As Bagley well knows, that occasion represented a special one-time price reduction program under which IBP rebated $8 per head to *all* customers purchasing *any* quantity of Cattle-Pak during the period May 26 to July 19, 1975. A copy of Bagley's own memo announcing this program is attached so there can be no mistake about this statement. This was not a continuation of—and had nothing to do with—the 1972-1973 program. It certainly was not unlawful by any conceivable standard and you have done serious harm not only to IBP, but also to 143 of IBP's innocent customers, by inserting their names in the record coupled with Bagley's false suggestion that they received illegal rebates.

Through the perversions of your process you have allowed Bagley to turn IBP's good faith efforts to justify to itself the discount program Bagley *himself* had created and to comply with the price discrimination laws into a vicious attack on IBP and its customers. There is no conceivable legislative purpose that would justify the evil you and Bagley have perpetrated in the guise of righteousness. As you well know, the Packers and Stockyards Administration had full access to the documents concerning the Waldbaum and 1972-1973 quantity discount matters, investigated them thoroughly, and concluded that no action was warranted. The facts and documents equally available to you demonstrated why they reached that conclusion, but you chose to

ignore them, and, instead, exploited Bagley's vindictiveness toward IBP in such a manner as to discredit the Congressional hearing process.

Bagley's Bias

We have demonstrated that Bagley's stories about illegal or questionable conduct by IBP are false.* What remains is to examine why he is actually making these accusations.

As you know, IBP is suing Bagley and others for breach—and inducement to breach—his contractual and fiduciary duties to IBP. Bagley has admitted that his disclosure of IBP confidential business information and documents was initially induced by Irving Stern. Stern was an International Vice President for the Amalgamated Meat Cutters union and District Director of the New York region who had helped Bagley get a job with the First National supermarket chain after he had been fired by Bohack in 1969. (Bagley was subsequently fired by First National.)

In 1976 Stern served 4 months in jail for evading taxes on bribes—a situation that surfaced as a result of information given to government investigators by IBP's former New York sales agent. Stern was aggravated at IBP and asked Bagley if he was similarly aggravated and whether he knew of anything that could cause problems for IBP. Bagley said there were undoubtedly some things that had

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* We have not tried to address in detail such irrelevant trivia as an alleged functional discount to IBP's Boston distributor some time prior to 1971 to help him introduce boxed beef into the Boston market, Wakefern's expressed desire to deal directly with IBP instead of its N.Y. sales agent in hopes of avoiding commissions, IBP's subsidy of three C. P. Sales' employees, and Holman's almost prophetic warning to Bagley that he had better plan on one plant being on strike at all times.

occurred during his 4 years at IBP, so Stern arranged a meeting between Bagley and Albert J. Krieger, the criminal lawyer (and not an antitrust lawyer) who had represented another union official who had been convicted along with Stern. Bagley disclosed IBP confidential documents to both Stern and Krieger, who wanted to start some kind of an antitrust suit against IBP and sought to interest (at least) the New York wholesale breakers, whose function had been

threatened by direct IBP boxed beef sales, and Bohack, which was in Chapter XI and pursuing litigation against everyone in sight.

Bagley's current claim that he met with Krieger as a "starting point for my becoming involved in at least trying to prevent a massive take-over by IBP of the packing industry" is simply a fabrication to conceal the malice with which he sought to stir up trouble for IBP and to create a defense for IBP's breach-of-fiduciary-duty suit. Bagley did not take his story and his documents to any responsible governmental authorities. Rather, he worked with Stern and Krieger to foment litigation against IBP. He also met with Jesse Prosten, the head of the Amalgamated's packinghouse-workers division, early in 1977, on the eve of a long strike at IBP's Dakota City plant, and disclosed what he thought would be IBP's strike strategy. And he met with Hawkins in January, 1977 to show him IBP documents and help in Hawkins' antitrust litigation against IBP—even though his own employer, Spencer Foods, was a co-defendant. In all of these meetings Bagley voluntarily disclosed information and documents to IBP's antagonists; but when the Packers and Stockyards Administration's investigators asked to see the documents, Bagley insisted upon a subpoena, which belies his newly invented theory that he just wanted to stand up and be counted before IBP swallowed up its competitors.

As a result of this conduct, IBP in 1977 sued Bagley for breach of his fiduciary duties to IBP by stealing IBP corporate documents and misusing them to defame and stir up litigation against IBP.

Now, you have furthered his vendetta by providing him with a privileged forum in which to make his false representations and disclose confidential IBP documents and information. Bagley's testimony before your Subcommittee must be recognized as nothing but a malicious attempt to blacken IBP's name and belatedly manufacture a defense to IBP's breach-of-fiduciary duty suit.

But as bitter as he is, Bagley could not deny that IBP has the "best integrity in the industry" for quality and has never tried to short-weigh its customers. He also admitted that IBP has achieved its goal of being the lowest cost producer and that its committment to boxed beef has brought about a revolution in the industry which has benefited consumers while at the same time permitting IBP to pay more to producers for their cattle. Bagley says he was proud to have been a vice president of IBP for four years and, when pressed by Congressman Richmond, the worst he

could say about IBP was that "It's *possible* that they became a *little overzealous* in some of the things they are doing." (Underscoring supplied.)

Instead of accepting Bagley's vindictive accusations of IBP, you should be listening carefully to what he said under questioning by Congressman Evans:

> "* * * the history of this country is the guy who buys the best mousetrap should build a better mousetrap. I don't think you can penalize IBP for being progressive,

hard-nosed in dealing with unions and getting favorable rates and running generally a good business.

Now, whether or not we should subsidize inefficiency, I don't believe in that either."

The real message that emerges from your hearings is that not even Bagley can deny the benefits to cattle feeders, retailers, and consumers achieved through IBP's innovative approach to beef production and distribution.

* * * *

In sum, we believe that the various charges made against IBP during your hearings which you have so readily accepted are unsupportable and were made for ulterior purposes. We believe the responsible members of your Committee, the media, the beef industry, and the public will come to realize this and share our outrage at your procedures and motives.

We also would like them to ponder other significant questions of public policy and principle which your conduct of the hearings necessarily raises.

First, you have apparently lost sight of the fact that IBP was once—and not that many years ago—the type of small business that you claim is your special concern. This company was founded in 1960 with the help of a $300,000 SBA loan which was repaid in 1962. Since then, through the hard work and ingenuity of our founders and all the men and women who have worked here through the past 19 years, we have become the largest and most successful beef

packer in the world and have been instrumental in instituting innovations which have saved consumers many millions of dollars. We did not reach this position by cheating our

suppliers or customers, but rather by treating producers fairly and turning out a quality product at a fair price geared to our costs. Instead of attacking us, you would be better advised to use IBP as a model of what small business can achieve. We place great trust in the common sense of the American public not to allow their governmental representatives to punish efficiency and business success.

Second, we fear that the press in this case has thus far (with isolated exceptions) failed in its function of critically assessing all aspects of your investigation and instead has simply repeated whatever has been said in your hearings because it has been "good copy" and because this industry is so difficult to comprehend. Although the press has resented past efforts by other governmental officers to manipulate the news for political or other ends, that is precisely what has occurred here.

Finally, we are disturbed by the ability of one member of Congress to transform the traditional congressional function of publicly funded investigations into a one-man vendetta against a public corporation and its shareholders. We realize that it has happened before and will no doubt happen again, but we are not yet cynical enough to believe that it should simply be tolerated and cannot be stopped. We have been encouraged by the sincere efforts of your Subcommittee colleagues to cut through the accusations made against IBP to determine what the facts really are. However, because of your demonstrated ability and willingness to manipulate the Subcommittee proceedings, we are declining to appear before you at this time.

Yours very truly,

IOWA BEEF PROCESSORS, INC.

/s/ By Robert L. Peterson,
President

jf
Enclosures

cc: Hon. Berkley Bedell
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20 Subcommittee via Graham Purcell - 18 members + 2 staff

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5 Harness, Marcue

3 Vic Preisser

20 IBP Plant Managers (slaughter, processing, hide, rendering)

2 IBP Corporate Library

3 Legal Department - IBP

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50 Public Affairs - Marcue, Harness (list attached)

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1 Fred Weetz - Des Moines Chamber of Commerce

IBP

DRAFT

TO: Each Director of the TCA (Attached List)

Dear

Charlie Ball wrote me and asked that I provide you with a copy of my recent Congressional Testimony on the cattle raising and packing industry. More importantly, it quotes testimony of Dr. Clayton Yeutter (President of the Chicago Mercantile Exchange) and the USDA's Barbara Schlei (Administrator of the Agricultural Marketing Service).

The bottom line is, 1) IBP was found innocent of Congressman Benjamin Rosenthal's charges 2) Electronic Marketing is not close to being ready, and 3) Big is not bad, just more efficient.

But, the nicest words came from Secretary Bergland himself, in response to a press conference question:

> ". . . on the basis of our investigation we (USDA) have *not* found them (IBP) to restrain trade or engage in monopolistic practices or any practices which are either unethical or illegal . . ."

I appreciate your interest in hearing a side of the story that Congressman Smith has chosen not to tell . . . his prejudices are hurting the entire beef industry . . . you, me, retailers, and even our consumers. As you might detect, I was peeved when I gave my testimony, but I was delighted when I read the Texas resolution. Thank you.

Yours for a stronger beef industry,

Bob Peterson

Iowa Beef Processors, Inc. Dakota City, Nebraska 68731
TELEPHONE: 402-494-2061

1979-80 DIRECTORY

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2915 South Georgia
Amarillo, Texas 79109
Tel. (806) 353-2126

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IBP

December, 1979

Dear Supplier, Customer or
Other Business Friend of IBP:

In the past year or more there have, on several occasions, been irresponsible charges of wrongdoing leveled at IBP by one or two members of Congress, business competitors, litigation adversaries, or other persons acting in their own self interest. For a long time IBP kept silent in the face of these accusations. However, when IBP was asked by the Livestock and Grains Subcommittee of the House Agriculture Committee to appear before it and respond to various charges which had been made, IBP determined to do so.

What follows is the complete text of the oral and written testimony of IBP delivered before that Subcommittee on October 30, 1979, including all exhibits thereto. Since you have a legitimate interest in the subject matter, we are making this document available to you. It is for your personal use (and/or the use of your company) and is not intended for republication or distribution to the general public. The testimony is being made available to you either because you have requested it or because we know of your concern about the issues raised. In that context we value our business reputation for integrity and fair dealing as well as for the high quality of our products, and we want you to know the truth and not be mislead by false accusations. If, after reading the testimony, you have any further questions please contact IBP's Public Affairs Department.

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add to list.

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Will *receive* a list of *State Farm Bureau Commodity Directors.* Add these to the list when received.

Attached list of Extension Agr. Economists.

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V 2 Bill Flemins - Beef Magazine - 1999 Shepard Rd St. Paul MN 55116

V 3 Warren Kester - Farm Journal
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6 Cecil Emmrish Norfolk Neb.
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V 11 Dick McDougal Loveland Nevada NCA
V 12 Champ Gross - Calf. News, Suite 409, 18345 Ventura Boulevd. Tarzana CA 91356
V 13 Bob Kemp. - Northwest Feeders Coop. PO Box 2724, Boise Id 83701
V 14 Loren Carlson - Chicho Minn, 4715 Grand NCA
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V 46 Harold Minderman - Ia. Farm Bureau Fed. 5400 Universe West Des Moines 50265
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